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HIGH COURT OF JUSTICE.

RIDDELL, J., IN CHAMBERS. OCTOBER 14TH, 1912.

GERBRACHT v. BINGHAM.

Jury Notice—Striking out—Practice—Con. Rule 1322—*Action against Surgeons for Malpractice—Question of Fact.*

Motion by the defendant Bingham for an order striking out the jury notice.

E. F. Ritchie, for the applicant.
J. H. Spence, for the plaintiff.
S. G. Crowell, for the defendant Easton.

RIDDELL, J.:—The action is for malpractice against two surgeons. The plaintiff by the statement of claim alleges that the defendants left certain gauze within the plaintiff's body after an operation, which had to be subsequently removed; and he charges negligence and want of skill. Dr. Easton, one of the defendants, says that Dr. Bingham had sole charge of the operation, and that he (Easton) was not negligent; Dr. Bingham says that he performed the operation with skill and in the proper manner.

In Bissett v. Knights of the Maccabees (1912), 3 O.W.N. 1280, 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 ought to be tried; he cannot pass that responsibility over to any one 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

*See Con. Rule 1322, passed on the 23rd December, 1911.