

HIS HONOUR JUDGE ROGER.

DECEMBER 6TH, 1913.

DICKINSON v. AUSTIN.

COUNTY COURT OF UNITED COUNTIES OF NORTHUMBERLAND
AND DURHAM.*Veterinary Surgeon — Counterclaim for Malpractice — Jury Notice
Struck out.*

ROGER, Co.C.J., held, that in malpractice actions against surgeons it is now a well established practice to strike out the jury notice, and the same practice should apply to actions against veterinary surgeons, and that as the case was set down for trial before the Judge, who heard the motion, it was better to dispose of the application in Chambers, rather than to wait for the trial.

Motion in Chambers for an order striking out jury notice served by the defendant, who counterclaimed for damages for alleged malpractice on the part of the plaintiff, who was a veterinary surgeon and who had sued in the Division Court for his fee. The defendant had applied for and obtained an order transferring the action to the County Court, and had filed and served a jury notice.

W. F. Kerr and D. H. Chisholm, for the plaintiff, relied on *Town v. Archer* (1902), 4 O. L. R. 389 and 390, and *Gerbracht v. Bingham* (1912), 23 O. W. R. 82, and contended that the test for a veterinary surgeon being the same as for a surgeon "*spondet peritiam artis*"—Beven on Negligence, 3rd ed., pp. 1131, 1171 and 1156, the practice should be the same as to trying the action with a jury, and that the application should be dealt with in Chambers and not wait until the trial: C. B. 398 (1).

F. M. Field, K.C., for the defendant urged that the matter was purely one of discretion, and that the Judge should not exercise his discretion by striking out the jury notice, and relied on *McNulty v. Morris* (1901), 2 O. W. R. 86, and *Kempffner v. Conerty*, cited therein and *Town v. Archer* (1902), 4. O. L. R. 390, contending that there were numerous facts in dispute which should be passed upon by a jury, and also contending that, in the case of an action for malpractice against a veterinary surgeon, the jury were better qualified than in an action against a surgeon, and that in the north west provinces the reports shewed that such