

The defendant's proceeding does not depend upon Rule 56 alone, but his statement of defence must be allowed to stand, either as originally put in or amended under Rules 127 and 128.

If a new affidavit of merits is required after an amendment, the Rule should say so, and it should not be left to inference.

The appeal will be allowed, order set aside, and the plaintiff will go to trial with the defence as pleaded. Costs to be costs in the cause to the defendant Lawless.

BRITTON, J., IN CHAMBERS.

JANUARY 29TH, 1915.

RE BARR REGISTERS LIMITED v. NEAL.

Division Courts—Trial of Plaintiff with Jury—Motion for Nonsuit—Power of Judge to Order New Trial without Application therefor—Mandamus.

Motion by the plaintiffs for a mandamus to the Judge of the County Court of the County of Peterborough directing him to enter judgment for the plaintiffs upon the verdict of the jury at the trial of an action in the First Division Court in the County of Peterborough. The learned Judge refused a nonsuit and ordered a new trial.

G. M. Willoughby, for the plaintiffs.

H. E. McKittrick, for the defendant.

BRITTON, J.:—I see no useful purpose that would be served by granting a mandamus in this case, and one should not be ordered unless the plaintiffs are clearly and beyond any doubt entitled to it. After the verdict of the jury, the Judge should have, as it is contended, directed a nonsuit or dismissal of the action.

Acting under a mandamus he could do either one or the other. Whatever he did would not place the plaintiffs in any better position than at present. If the plaintiffs desired a nonsuit, no doubt the Judge would grant it, and that would be the same as a dismissal of the action, unless the plaintiffs desired to have, as part of the judgment, reserved to them the right of bringing another action. The plaintiffs would then be in no better position than at present. Apart from either, I am of op-