in which claimants were made plaintiffs. The claimants appealed from the order, on the ground that the summons and order were improperly granted, and that there was no basis or foundation for the order, because:

(1) The affidavit of the sheriff on which the interpleader summons was granted did not state (*a*) that the goods seized were the property of the defendants, or (*b*) that the sheriff believed them to be so, (*c*) or any facts which would warrant the seizure of them as defendant's goods.

(2) That the affidavit did not state that the sheriff was in possession of the goods at the time of making the application, or that the proceeds of any sale thereof were then in his hands.

(3) That the evidence before the referee showed that the claimants were in possession of the goods at the time of the seizure, and claimants should therefore have been made defendants in the issue, and not plaintiffs.

It was urged, in reply, that the claimants, by not raising the first two questions before the referee, had waived the right to take advantage of the same on appeal, as they were mere irregularities, and that as to the question as to who should be plaintiff in the issue, the referee had exercised his discretion, which would not be reviewed on appeal.

Counsel for claimants in reply: The defects complained of in the sheriff's affidavit are not mere irregularities or formal defects, but matters of substance going to the whole foundation of the sheriff's right to an interpleader under the statute and could not be waived, citing in this connection, *ex parte Coates*, 5 Ch.D., 779, followed by *ex parte Johnston*, 25 Ch.D., 114-116. As to what must be shown by the sheriff in his affidavit to entitle him to relief: *Archbold*, 1406; *Lush*, 777; *Parkinson's* C.P., 151; *Cababe*, 31; *Chitty's Forms*, 822; *Northcote* v. *Beauchamp*, M. & S., 158; *Cook* v. *Allen*, 2 Dow., 11; *Anderson* v. *Calloway*, 1 Cr. & M., 183; *Scott* v. *Lewis*, 2 Cr. M.R., 289; *Holton* v. *Guntrip*, 6 Dow., 131; *Crump* v. *Day*, 4 C.P., 760; *Day* v. *Carr*, 7 Ex., 882; *Wheeler* v. *Murphy*, 1 Prac., 366; *Ogden* v. *Craig*, 10 Prac., 378; *Merchants Bank* v. *Herson*, 10 Prac., 117; *Duncan* v. *Tees*, 11 Prac., 66 and 296, and others. As to plaintiffs in issue: *Merchants Bank* v. *Herson* and *Duncan* v. *Tees*, *supra*; *Dom. Sav. & I. Co.* v. *Kilroy*, 7 C.L.T., 87, and *Morris* v. *Martin*, 19 Ont., 564.

The fact of an issue having been decided by the referee constituted no waiver on the part of the claimants. It was an operation of law under the statute, consequent upon the sheriff's application. The claimants would not "abandon their claim," and as they decided to maintain their rights, the referee could only, in such case, direct an issue, which was a position forced on the claimants by the statute without any alternative.

Held, (1) That the sheriff's affidavit was clearly insufficient, but the objections thereto not having been taken before the referee, and the learned Judge being of the opinion that the objections did not go to the jurisdiction, but were merely questions of practice, they could not prevail on this appeal.

(2) The practice in this court is settled, that when goods have been seized in the possession of a claimant, he should be the defendant in an issue between him and an execution creditor; and as the only evidence on the point shows that *prima facie* the claimants were in possessio when the goods were seized, the order of the referee should be varied by making the claimants the defendants in the issue.

Order accordingly.

The issue was settled according to that directed in *Duncan* v. *Tees*, 11 Prac., 296.

Nugent and *Archer Martin* for claimants.

Campbell, Q.C., and *Mathers*, for execution creditors.

Cumberland for sheriff.

[The claimants have appealed from so much of this order as discharges the summons in appeal to set aside the interpleader summons and order.—ED.]

TAYLOR, C.J.] [Feb. 14.

LONDON & CAN. L. & A. CO. *v.* MUNICIPALITY OF MORRIS.

Practice—Appeal to Supreme Court from order allowing final judgment.

Application by way of summons to Judge in Chambers for leave to appeal to Supreme Court from ruling of Full Court confirming order of KILLAM, J., allowing plaintiffs to sign final judgment under A.J. Act.

It was objected that an appeal would not lie as this was an order made in the exercise of judicial discretion, within the meaning of sec. 27, Sup. Court Act.