power to give the defendant relief, and we all think he was wrong in making the order to arrest upon such an affidavit," and so the court ordered the prisoner *to be discharged*, but did not set aside the order or the capias.

Now in neither of the cases before me is the summons framed in the shape which, as it appears to me, is required by 22 Vic. ch. 22 sec. 31, although in both cases new affidavits are filed. The summonses in both cases call upon the plaintiffs respectively to show cause why the judicial act of the Judge making the order should not be set aside. This, as above stated, appears to me to be an error, and I shall not assume a jurisdiction which I think I have not, to set aside the Judge's order or the capias issued thereunder for any defect or insufficiency (if any there be) in the material upon which the Judge making the order in each case exercised his judicial functions or for any other cause.

In *Damer* v. *Busby*, all the new matter introduced by affidavits was expressly waived and withheld from my consideration, the defendant electing to rest upon the alleged insufficiency of the material used before the Judge, and the variance between the copy of the capias and the original and the fact that neither affidavits or fiat are entitled in any court, in preference to the plaintiff obtaining an enlargement to meet the affidavits filed on defendant's behalf. With respect to this case, I wish to observe, however, that I am of opinion, that there is nothing whatever in the objections contained in the heads of objection in the summons above numbered 1, 5 and 6, and I have been authorised by C. J. Hagarty to say that he refused to grant the summons upon the suggestion of insufficiency in the statement of the debt, and that he was surprised to find his name to a summons involving that objection. *Ellerby* v. *Walton*, 2 Prac. Rep. 147, lately followed in *Molloy* v. *Shaw*, 6 C. L. J. N. S. 294, by Richards, C. J., is an answer to the 2nd, 3rd and 4th objections. It appears to me to be as much the duty of the Clerk of Process, (who alone can determine out of which court the process is to issue,) as it is of the plaintiff, to see that the affidavit is entitled in the proper court when filed on the process issuing, and I cannot see any good reason why he should not entitle the affidavit without any order, upon the omission being discovered. As to the order itself, when made, it could not be determined in what court to entitle it, nor does the statute say that it shall be entitled; and in the present case, being endorsed *on the* affidavits, I see no occasion for its having any separate title from that contained in the affidavit, when that is inserted. As to the 7th objection—the variance between the copy and the original capias, doubtless if the objection be sufficient, the *arrest* may be set aside, notwithstanding the opinion I have expressed as to my having no jurisdiction to review the decision of the Judge who granted the order upon the materials before him. In *Macdonald* v. *Mortlock*, 2 D. & L. 963, where a defendant was described in a capias as "Mortlock," and in the copy as "Mortlake," it was held that the *copy* might be amended. In a subsequent case, *Moore* v. *Magan*, 16 M. & W. 95, where the defendant was arrested under a capias addressed to the *Sheriffs* instead of the *Sheriff* of Middlesex, the Court of Exchequer held that the writ itself might be amended, but that the *copy* could *not*. If I had to choose between these seemingly conflicting cases I should have no hesitation in adopting *Macdonald* v. *Mortlock*; but it is not necessary, for two reasons,—first, because both of these cases were before the C. L. P. Act, and are not, I apprehend, of much weight as limiting the powers of the court or a Judge as to amendments since the passing of that Act; and secondly, that assuming *Moore* v. *Magan* to be still a binding authority, it is sufficient for the purpose of the case before me, for the writ being amended to conform to the copy, all objection is removed, and indeed the copy is the more perfect of the two, as containing the Christian names of the plaintiffs instead of the initial letters of their names. I think that there is no doubt that both the Judge's order and the capias may in this respect be amended, to conform to the copy served. In *Folkard* v. *Fitzstubbs*, 1 F. & F. 376, Hill, J., refused to set aside a writ of summons and also a writ of capias upon the ground of irregularity in that the summons was wrongly tested, "Thomas Lord Campbell," and the capias "Thomas Lord Campbell, Knight."

The result therefore is, that in *Damer et al.* v. *Busby* the summons must be discharged, but I shall not give the plaintiff any costs, for I have no desire to countenance or encourage the carelessness displayed, both in the description of the residence of the deponent King in one of the affidavits, and in not taking the precaution of comparing the original capias with the copy before handing it to the sheriff for execution.

In *Black* v. *Wigle* the summons must also be discharged for the reason already stated, viz., that the frame of the summons asks that the judicial act of the Judge who made the order shall be *set aside*, and does not ask the relief indicated in the Statute, 22 Vic. ch. 22 sec. 31.

Had the frame of the summons been different, I should have held in this case that the plaintiff's affidavits in reply to defendant's, so displace in my judgment the substance of the latter, that I could not have discharged the prisoner upon the ground contained in these affidavits; and as to the objection that no cause of action is stated sufficiently, my objection to review the decision of the Judge who made the order would have been the same as it now is, even though the frame of the summons had been in the words of the Act, for the discharge of the prisoner from custody. The only case in which, as it seems to me, the Judge to whom an application to discharge the prisoner from custody is made under the provisions of the Act, upon the same material only as was before the Judge making the order, should assume the right of discharging the prisoner, would be the case of a manifest *defect*, appearing *in the material necessary to be supplied to call the judicial function into action*. For example, the statute, 22 Vic. ch. 24 sec. 5, requires that the causes upon or in respect of which a Judge may act, shall be presented to him *upon affidavit*. Now if a paper purporting to be an affidavit, containing abundant matter to warrant the making the order if the affidavit had been sworn, be presented to a Judge, but it in fact should contain no jurat, or no commissioner's or other person's name as having adminis-