March, his daughter, only 16 years of age, was delivered of a child, whereby plaintiff had lost and was deprived of her services, and had incurred expenses in and about nursing his said daughter, and in and about the delivery of her said child, and that plaintiff has a good cause of action against the said Alexander Wigle the younger, of over one hundred dollars, to wit $2,000 *in respect of such loss of services and expenses aforesaid;* yet the affidavit did not allege that Alexander Wigle, the younger, was the father of the child of which plaintiff's daughter had been delivered; and for the absence of this allegation, it was contended that the affidavit disclosed no cause of action.

Spencer shewed cause:—The omission of the Court from the title of the affidavit is not an irregularity: *Ellerby* v. *Walton*, 2 Prac. Rep. 147; *Molloy* v. *Shaw*, 6 C.L.J.N. S. 294. Even if it were, the objection being merely technical, leave would be given to amend: *McGuffin* v. *Cline*, 4 Prac. Rep. 134; *Cunliffe* v. *Maltass*, 7 C. B. 701; and this notwithstanding the proceedings are by way of arrest: *Swift* v. *Jones*, 6 U. C. L. J. 63; *Fround* v. *Stokes*, 4 Dowl. 125; *Primrose* v. *Baddely*, 2 Dowl. 350; *Sugars* v. *Concanen*, 5 M. & W. 30.

If the arrest is set aside on this ground, leave should be given to re-arrest: *Perse* v. *Browning*, 1 M. & W. 362; *Talbot* v. *Bulkeley*, 16 M. & W. 193.

As to the 2nd objection, that the cause is in the C. P., while the affidavit to hold to bail is sworn before "a Commissioner in B. R."—see Con. Stat. U. C. c. 39, secs. 1, 6 & 8. The words of the affidavit sufficiently disclose a cause of action, and the decision of the Judge who granted the order cannot be reviewed here: *McGuffin* v. *Cline*, *ubi supra*; *Terry* v. *Comstock*, 6 U. C. L. J. 235; *Palmer* v. *Rodgers*, *Ib.* 188; *Hargreaves* v. *Hayes*, 5 E. & B. 292; *Runciman* v. *Armstrong*, 2 C. L. J. N. S. 165.

Osler, *contra*.

May 15.—Judgment in both cases was now delivered by

Gwynne, J.—In *Hopkins* v. *Salembier*, 5 M. & W. 423, A.D. 1839, the application was made to the full court, and it was for a rule to shew cause why the capias should not be set aside, and the bail bond given up be cancelled, on the ground that the affidavits were insufficient, and also upon affidavits denying that the defendant was about to leave the country. The rule was discharged upon the sole ground that the rule *nisi* should have asked to set aside or rescind the Judge's order, and not to set aside the capias; for if that should be set aside the Sheriff would be made a trespasser; and the court held that where the application is rested upon the insufficiency of the affidavits upon which the Judge's order to hold to bail is made, it should be to set aside the order.

In *Sugars* v. *Concanen*, 5 M. & W. 30, A. D. 1839, the application was to the court, and the form of the rule *nisi* was to shew cause why the bail bond executed by the defendant should not be delivered up to be cancelled on his entering a common appearance, upon the ground of an irregularity in the copy of the capias served, which stated the writ to be returnable within four calendar months instead of one; but the rule was discharged, the court intimating that applications grounded on irregularities ought to be made within the time for putting in bail, which that application had not been.

In *Walker* v. *Lumb*, 9 Dowl. 131, A. D. 1840, the application was to the Practice Court and the rule *nisi* was to set aside the Judge's order for arresting the defendant upon affidavits meeting the affidavit upon which the order had been granted as to the intention of the defendant to leave the kingdom, and denying that he had any such intention, and shewing that he had applied monies realised from a sale of goods towards payment of his creditors. That was held to be an application on the merits and not for irregularity, and that therefore the application was not too late, although made after the expiration of the time for putting in bail. The case of *Sugars* v. *Concanen* upon points of irregularity was approved, and the court adopted the language of Mr. Lush in his practice, viz, that "when the complaint is founded on an irregularity, the application must, as before, be made within the time allowed for putting in bail, and before any fresh step with regard to these proceedings has been taken, but where it is founded on a material defect in, or, as it would seem, on the falsity of the affidavit, the defendant may *perhaps* apply at any time while the suit is pending." The rule in that case was made absolute, because the order had been granted on the ground of an assertion attributed to the plaintiff, to the effect that he intended leaving the kingdom when he should sell certain machinery, and the defendant upon affidavit fully met this, not only denying that he had any intention of leaving the kingdom, but shewing that he had sold the goods, and had applied the proceeds in paying his creditors, and the plaintiff offered no affidavits in reply to this affidavit.

In *Schletter* v. *Cohen*, 7 M. & W. 389, A. D. 1841, the application was to rescind an order of Rolfe, B., directing the issue of a capias for arrest of defendant, upon the ground of an alleged defect in the affidavit to hold to bail, viz., that the affidavit which was made before the suing out of a writ of summons was *not* entitled in the cause, but the court held this to be no defect.

In *Needham* v. *Bristowe*, 4 M. & Gr. 262, A. D. 1842, the application was to the full court, having been referred there by Wightman, J. from Chambers, but for what reason does not appear. The form of the rule *nisi* was to show cause why an order made by Lord Denman, C.J., at Chambers, dated 15th March, for holding the defendant to bail, should not be set aside, why the writ of capias issued in pursuance of the same should not be set aside for irregularity, and why the bail bond given should not be given up to be cancelled. The irregularity complained of in the capias was in the endorsement thereon, which was issued by the plaintiff in person; wherein he described himself as "of the Fleet Prison in the parish of St. Bride in the city of London." It was held that this was no irregularity, so that the objection to the capias failed. The decision in effect was, that as to setting aside the Judge's order, the application was in the nature of an appeal, and that the court could give no judg-