If the English rule of Hil. Term, 2 Wm. IV., did not apply to a prisoner who had been rendered by his bail, then I do not think our rule of 20 Vic. No. 99 can, and this case is therefore unprovided for.

If I am right on this point, then rule No. 168 of 20 Vic., comes to our aid: it declares that in all cases unprovided for by statute or rule of Court, the practice as it existed in our Courts before the passing of the Common Law Proceedure Act of 1856, shall be followed.

By the rules of Q B. U. C., Michaelmas Term, 4 Geo. IV., No. 1, it is provided, that in future the practice of this Court, * * is to be governed, when not otherwise - -ovided for, by the established practice of the Court of Queen's Bench in England.

In this view of the case, without deciding whether *Bower* v. *Baker*, is to be followed, or whether *Thorn* v. *Leslie*, is to be regarded as the more correct view of the law, (which last case seems to be adopted in Chitty's Archbold, 8 Edition, page 1058). It seems to me, defendant fails as he does not shew that due notice of his surrender in discharge of his bail, was given before the end of last Term, as required by the rule of Geo. III. It is not necessary to say much as to the necessity of notice of the render of a defendant being given, before a plaintiff can be considered as called upon to charge him in execution.

By our law, a defendant may be surrendered in discharge of his bail, in any county of Upper Canada. If his being so rendered makes it necessary for a plaintiff to charge him in custody, within two Terms, it seems to me, only reasonable that he should have notice of the render, and the rule requires it.

But the defendant contends, that *Baxter* v. *Baily*, is an authority in his favour, to shew that on an affidavit similar to the one filed in this case, the Court held, it sufficiently shewed defendant had notice of render.

The Imperial Stat. 10 Geo. IV., & 1 Wm. IV., cap. 70 sec. 21, points out the mode in which a render shall be effected, and giving notice in writing to the plaintiff's Attorney, is a part of the proceeding, on the completion of which, the bail shall thereupon be wholly exonerated from liability as such. The affidavit in *Baxter* v. *Baily*, was made by the plaintiff, and he states, that the defendant on the day therein mentioned, was rendered *in discharge of bail.* This, of course, might imply that the defendant had given him notice of such surrender, and after making such affidavit, he could not deny having recieved notice, and the Court held, that it sufficiently shewed plaintiff had recived the notice required to be given.

In this case, however, the only affidavit in relation to the render, is made by the defendant himself, and his words are, "That I was rendered by my bail in this cause, to the Sheriff of the County of Hastings, on the eleventh day of May last." This certainly does not necessarily imply that notice of the surrender was then given, I think the notice material, and if it was given, defendant ought to shew it.

On the whole, I think the application fails, but as it seems to have the authority of *Bower* v. *Baker*, and some other cases, to a certain extent in its favour, and is an application by the prisoner to obtain his liberty, the summons will be discharged without costs.

If the notice of render was given in due time, and defendant is advised, after carefully considering the cases referred to on the subject, to apply again, on shewing the time the notice was given, he can do so. The doctrine is clearly established, if a prisoner is once supersedable he is a' ays so, and it is equally clear, I have no doubt, that a prisoner may renew his applications from time to time, for his discharge from imprisonment, particularly if he brings forward any new matter.

Summons discharged without costs.

KEYS v. MURPHY.

Judgment by default—Special indictment—Declaration and notice to plead.

In cases where the writ might have been specially endorsed under the 61st section C L. P. Act 1856, but was not the declaration should be filed with a *notice to plead* endorsed and the judgment by default thereon should be by *nil dicit.* And the usual judgment by default for non appearance to a specially endorsed writ signed under such circumstances is irregular.

July 1st, 1859.

This was an application either to set aside the service of the writ of summons and declarations alleged to have been served in this cause, together with the judgments by default for non appearance, and the writs of *fieri facias* issued thereon and all proceedings under the said writs on the grounds,

1st. That the writs had never been served.

2nd. That the declaration and notice to plead had not been served.

3rd. That the plaintiff was not entitled to sign judgments for non appearance after filing declarations.

Or to revise the taxation of costs on entering judgment in these cases on the ground that the plaintiff was not entitled to the costs of the declaration filed in this cause, the actions having been brought for liquidated demands.

The evidence as to the service of the writs of summons and declarations was very conflicting.

The particulars of these cases sufficiently appear in the judgment.

RICHARDS, J.—The judgment rolls filed in these causes are in the form of judgments for non-appearance to a specially endorsed writ, the writs were not specially endorsed.

The defect in that respect was intended to be supplied by filing a declaration under the 61st section of the Common Law Procedure Act of 1856 (similar to the 28th section of the English statute of 1852) This declaration was not endorsed with a notice to plead in eight days as is required by the statute, there was however, a notice to plead served on the defendant more than eight days before the signing of judgment.

The judgment signed after the filing and serving of a declaration should be by *nil dicit*, such judgment when for a debt or liquidated demand in money is final under 93rd section of the English C. L. P. Act and the 142nd of our own, where the damages are substantially a matter of calculation, it may be referred to the master under the 94th section of the English Act and 143 of our own statute.

After the declarations were filed and served they should have been copied on the rolls and judgment entered by default. This has not been done, and the judgment rolls are nearly in the form of a judgment on a specially endorsed writ, which the plaintiff was not entitled to enter as such writs were not served.

In Chitty's Forms, 7th edition, at page 60, it is stated, referring to the 28th section of the English Act (and to the 61st section of our own,) "a declaration is in this case filed against defendant with a notice to plead in eight days; a. he judgment will be signed by default for want of a plea, if he does not plead accordingly." He then refers to the form of the judgment, post index "judgment by default," under that head, at page 496, a form is given for judgment by *nil dicit* in an action for a debt or a liquidated demand in money. The form directs that the declaration should be copied and then to proceed on a new line.

"And the defendant in his proper person says nothing in bar or preclusion of the said action of the plaintiff whereby the plaintiff remains therein, undefended against the defendant.

Therefor it is considered that the plaintiff do recover against the defendant the said £ —— and £ —— for costs of suit which said money in the whole amount to ——"

The forms then shew judgment on an assessment under a writ of inquiry, also when ascertained by the master.

In a note at the same page it is stated that by the English C. L. P. Act of 1852, at section 90, in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final, judgment by default is final in those cases in which the writ may be specially endorsed under the 25th section of the C. L. P. Act of 1852.

Judgment by default is interlocutory when the action is for the recovery of unliquidated damages. In that case damages must be assessed by a writ of inquiry or by one of the masters under the 93rd section of the C. L. P. Act.

At page 59 in referring to section 28 of the English C. L. P. Act, it is laid down, "in this case, and when the writ is not specially endorsed it will be seen that the statute requires that a declaration shall be filed and judgment cannot be signed unless defendant makes default in pleading within the limited time, viz: eight days from the filing of the declaration. It does not require that there should be any notice of the filing and such notice is not requisite unless the plaintiff is proceeding under a judge's order expressly ordering it. The judgment would be a judgment by default for want of a plea. It will also be seen that the judgment will be final if the declaration is for a debt or liquidated de-