

Patterson contended, that under Rule 99 of our Courts, defendant was entitled to his discharge, for by that rule the plaintiff is bound "to cause the defendant to be charged in execution, within the Term next after the trial or judgment." He referred to *Bower v. Baker*, 2 Dowl P.C. 688, as an authority to shew that defendant not being in custody at the time of the trial, made no difference, that he was, in fact, surrendered after a trial in a vacation, and being in custody any part of the vacation it would relate to the preceding Term, and being in custody during part of the vacation, he must be considered in custody during the whole of it. He also referred to *Baxter v. Baily*, not only as confirming *Bower v. Baker*, but as shewing that the defendant having been surrendered by his bail, sufficiently implies notice of the render, if notice were necessary. He also referred to *Foulkes v. Burgess*, 2 M. & W. 849, in further support of *Bower v. Baker*.

On the other side reference was made to *Thorn v. Leslie*, 8 A. & E. 197, as shewing that *Bower v. Baker* was not good law, and also to *Colborne v. Hall*, 5 Dowl P.C. 534. It was urged, that the rule only applied to prisoners imprisoned at the time the rule professes to refer to them, thus, when it refers to trial, it means a trial when defendant is in custody, as also to judgment under the same circumstances. That there is nothing to shew that the defendant ever gave notice of render, that the rules of Court require that to be done, and such was the English practice at the time our rules of Court were made. That in the case referred to, reported in M. & W., the affidavit shewed the defendants had been surrendered in discharge of his bail. That all the affidavits shew here, is, that defendant was surrendered by his bail. That the affidavits also shew, that at the time the summons issued, defendant had escaped from gaol, and was out of custody. Reference was made to 9 Tidd's Practice, at page 360, as shewing the practice and rules in England, which should govern this case.

RICHARDS, J.—The English Rule in Q. B. of Hil. Term, 26 Geo. III., amongst other things provided, "In case of a surrender in discharge of bail, after a trial had or final judgment obtained, unless the plaintiff shall cause the defendant to be charged in execution, within two Terms next after such surrender, and due notice thereof, of which two Terms, the Term whereon such surrender shall be made shall be taken as one. * * * The prisoner shall be discharged out of custody by *supersedeas*." A previous part of the same rule provides as follows, "And in all cases after such trial shall be had or final judgment obtained against any prisoner in custody of the Marshal or in any other gaol or prison, unless the plaintiff shall cause such person to be charged in execution, within two Terms next after such trial shall be had or final judgment obtained, of which two Terms the Term on which such trial shall be had or final judgment obtained, shall be taken as one. * * * The prisoner shall be discharged out of custody by *supersedeas*."

The English Rule of Hilary Term, 2 William IV., is as follows: "the plaintiff shall proceed to trial or final judgment against a prisoner, within three Terms, inclusive, after declaration, and shall cause the defendant to be charged in the execution, within two Terms, inclusive, after such trial or judgment, of which the Term in or after which the trial was had, shall be reckoned one. Our rule of Hil. Term, 13 Vic., No. 31, is precisely like this, except there is added to it the further words, "And when judgment shall be entered up in vacation, then the plaintiff shall cause the defendant to be charged in execution, before the end of the succeeding Term."

Our rule of Trin. Term, 20 Vic., No. 99, is as follows, "The plaintiff shall proceed to trial or final judgment against a prisoner, in the Term next after the issue is joined, or at the sittings or Assizes next after such Term, unless the Court or a Judge shall otherwise order, and shall cause the defendant to be charged in execution, within the Term next after such trial or judgment." The rule is a transcript of the English Rule, No. 124 of Hilary Term, 1853.

The first question to be decided is, whether our rule of 20 Vic., applies to the defendant's case, he not having been a prisoner at the time of the trial, and if he is to be viewed as a prisoner at the time of the judgment only, then the Term next after such judgment has not passed, and defendant consequently is not *supersedeable*.

Bower v. Baker, reported in 1 A. & E. 860, & 2 Dowl Practice Cases 608, decided under the English Rule of Hil. Term, 2 Wm. IV., 85, is to the effect, that if a trial take place in vacation, and the defendant surrenders after it and before the following Term, he ought to be charged in execution, in that Term. It was argued in that case, that the rule did not apply, as defendant was not a prisoner at the time the trial took place. The rule of Hil. Term, 26 Geo. III., was also referred to. Lord Denman in giving judgment says, "It is true there may be some doubt on the construction of this rule, as to whether it applies to the case of a prisoner actually in custody at the time of the trial, or to one who surrenders afterwards during vacation. But as the application concerns the liberty of the subject, we think it better to hold, the defendant ought to have been charged in Easter Term, (the Term following the vacation in which he was rendered) and, therefore, not having been so charged, he is now *supersedeable*." The facts are more distinctly set forth in the report of the case in A. & E., from which it appears, that although the case was tried in Hilary vacation on the 26th March, and defendant surrendered in the same vacation on the 29th March, yet the judgment was of Hilary Term, and, therefore, defendant was, under this rule, entitled to be charged in Easter Term, being the second Term, inclusive, after the judgment.

Foulkes v. Burgess, 2 M. & W. 851, recognizes *Bower v. Baker*, and *Baxter v. Baily*, 3 M. & W. 415, affirms it. But Baron Park in the latter cases says, "the first point (that is defendant being on bail at the time of the verdict, and therefore not a prisoner) does not depend solely on the rule of Hilary Term, 2 Wm. IV., but also on the rule of this Court, 26 & 27 Geo. II. (He then read the rule similar to that in Q. B. of Hilary Term, 26 Geo. III., as to charging the defendant in execution, within two Terms after surrender, and due notice thereof, which I have quoted above, and then proceeds,) The question, then, is whether a surrender in vacation has or has not for this purpose, a reference to the preceding Term, and the case of *Bower v. Baker* decides that it has."

In *Thorn v. Leslie*, 8 A. & E. 195, it was contended in argument, that a surrender in vacation did not relate back to the preceding Term, under the rule of B. R. of Hilary Term, 26 Geo. III., and *Smith v. Jeffys*, 6 T. R. 776, was referred to as authority on that point, Mr. Justice Pattieson remarked, "That applied to the case when the trial was in the vacation in which the render took place."

The render was not allowed to relate back to a Term preceding the trial.

In giving judgment **LITTLEDALE, J.**, observes, "The judgment was signed a year before the render. Then has the prisoner been in custody for two Terms? That depends upon the question whether the render relates back to the Term preceding the vacation in which it was made. By the practice, it does so relate when the judgment is of an earlier Term. We cannot extend the rule as to dating judgments from the day on which they are signed to the render."

I may here remark, that Mr. Justice Littledale, had occasion to consider the doctrine of relation to the time of entering judgments, in the Practice Court in *Colborne v. Hall*, 5 Dowl 534, decided previous to *Thorn v. Leslie*.

Mr. Justice Pattieson in giving the Judgment in *Thorn v. Leslie* observes, the rule as to the relation of the render is decisive, unless the new rules have made any alteration. * * * *Smith v. Jeffys* shews merely, that if the trial be in vacation, and the render afterwards in the same vacation, the Plaintiff has the two following Terms. It does not apply here. There is indeed a case of *Bower v. Baker*, in which it was held, that in the case of a surrender after trial, both being in the same vacation, the plaintiff had only one Term. I cannot accede to that decision, except upon the ground that the judgment there, from what cause does not appear, was entered up as of the Term preceding the trial, so that, perhaps, by the same fiction, the verdict also may be considered as having taken place in that Term."

Baxter v. Baily seems to me to decide in effect, that *Bower v. Baker* can only be supported on the ground that the defendant was surrendered in discharge of his bail, and that under the old rule of Hilary Term, 26 Geo. III., it was necessary to charge him within two Terms, inclusive, after the surrender and notice thereof.