

Q. B.]

THE QUEEN V. WHEELER ET AL.—THE QUEEN V. RITCHIE.

[Q. B.]

of days was in dispute to have referred that point to the Master, who would then have a complete tariff to enable him to tax the sheriff's whole bill. No objection is however urged except those above stated.

In my opinion the order of the judge in vacation as to what is to be deemed "a reasonable charge" for services not provided in any tariff, is as final as a rule of court on the same subject would be in term; and I arrive at this conclusion, among other reasons, because I think it was not meant that either the court or a judge should tax the sheriff's account, and determine what services the sheriff had rendered, but that they should supply the foundation for ascertaining what he is entitled to, by fixing a rate of charge for services rendered and for which no rule of court or tariff has made any provision.

I think therefore the rule should be discharged, but without costs, as the point has not been previously raised.

My brother *Hagarty*, having considered this case with us, concurs in the judgment.

MORRISON, J., concurred.

Rule discharged.

THE QUEEN V. WHEELER ET AL.

Con. Stat. U. C. cap. 117—Recognizance improperly estreated—Relief of bail.

Where bail entered into a recognizance conditioned for the appearance of their principal to answer a charge of assault with intent to commit rape, and the only bill found against the accused was for the more serious offence of rape, and their recognizance estreated for his non-appearance to answer that charge, a rule was made absolute for their relief from the estreated recognizance.

[Q. B., E. T., 1865.]

John McBride, during Easter term last, obtained a rule calling upon the Attorney-General or his agent to show cause why the writ of *fiery facias* issued to the sheriff of the county of Kent, against Josiah Hewson and John Myers, in this matter, should not be set aside, or all proceedings thereon perpetually stayed, on (among others) the following ground: that William Wheeler was committed on a charge of rape and attempting to procure an abortion, and the condition of the said recognizance was that he should take his trial on a charge of assault with intent to commit rape, and the bill found by the grand jury against the said Wheeler was for rape and that only; or why the said recognizance and the said writ of *fiery facias* should not be discharged and set aside on all or any of the grounds mentioned in the rule, and on the other grounds set forth in affidavits and papers filed; or why such order should not be made regarding the discharge of the said forfeited recognizance as this court should deem fit on the return of the said rule.

The recognizance was in the following form:

County of Kent, } Be it remembered, that on
to wit. } the tenth day of March, in the
year of our Lord 1865, Josiah Hewson, of the
gore of Camden, and John Meyers, of same place,
personally came before me, the undersigned, one
of Her Majesty's justices of the peace in and for
the said county, and severally acknowledged
themselves to owe to our Sovereign Lady the
Queen the several sums following, that is to say:

the said Josiah Hewson in the sum of two hundred dollars, and the said John Meyers in the sum of two hundred dollars, of good and lawful money of Canada; to be made and levied of their several goods and chattels, lands and tenements, respectively, to the use of our said Lady the Queen, her heirs and successors, if William Wheeler fail in the condition following.

Taken and acknowledged the day and year first above mentioned, at Chatham, before me.

(Signed) THOS. MCCREA, [L.S.]
Police Magistrate.

The condition of the above recognizance is such, that whereas the said William Wheeler was charged, before James Smith, Esq., and other justices then present, for that he the said William Wheeler, within six months past, did assault Emily Wilson with intent to commit rape upon the said Emily Wilson; if, therefore, the said William Wheeler will appear at the next Court of Assize and Nisi Prius and General Gaol Delivery, to be holden in and for the county of Kent, and plead to such indictment as may be found against him by the Grand Jury, for and in respect of the charge aforesaid, and take his trial upon the same, and not depart the court without leave, then the said recognizance to be void, or else to remain in full force and virtue.

The bill found by the grand jury was for rape, and it was for non-appearance to the bill so found that the recognizance was estreated.

The only point argued was that as to the difference between the recognizance and the bill found, and the effect thereof on the obligation of the bail.

Robert A. Harrison, during last Trinity term, showed cause.

John McBride supported the rule.

HAGARTY, J.—We think this estreat cannot be sustained. The condition of the recognizance was for the appearance of the accused to such indictment as should be found against him for an assault on Emily Wilson with intent to commit rape; but the bill found was for the more serious offence of rape. Bail might well be content to become bail for the appearance of the accused to answer the lesser charge, and yet refuse to become so on a charge more grave. They did not become bail for the appearance of the accused to answer a charge of rape, and his non-appearance to answer that charge was no breach of the recognizance. The rule must be made absolute for the relief of the bail.

MORRISON, J., concurred.

Per cur.—Rule absolute.

THE QUEEN V. RITCHIE.

Con. Stat. U. C. cap. 117—Bail—Condition of recognizance—Meaning thereof—Relief from estreat.

Held, that under an ordinary recognizance of bail on an indictable charge, the accused is not bound to appear unless a bill be found against him; when therefore the accused was called, though the grand jury had not, owing to absence of witnesses, an opportunity of finding a bill, and his recognizance estreated, a rule was made absolute for the relief of the bail.

[Q. B., E. T., 1865.]

D. McMichael, during last Easter term, obtained a rule calling on the Attorney-General or his