

P R O C U R A T O R - F I S C A L .

1687. *June.*EDMONSTON and HAMILTON *against* STEVENSON.

JAMES STEVENSON having granted a bond to Mr Walter Edmonston, Procurator-fiscal of the Bailyary of Cunningham, to present William Stevenson, the said James's son, within the tolbooth of Irvine within twenty-four hours after he should be required, to underlie the law for certain crimes committed by him, under the penalty of 2000 merks in case of failzie; and James Stevenson being required to present his son, which not being done, Mr Arthur Hamilton, the Bailie-depute, by decret declared the penalty to be forfeited; and Stevenson being charged upon the bond for payment of 2000 merks of penalty, he suspended upon this reason, That Edmonston, the Procurator-fiscal, had granted him a discharge of the same. *Answered,* That the suspender having incurred the penalty by the not presenting of his son, it was in the place of a fine, which belonged to the Bailie-depute, and could not be discharged by the Procurator-fiscal without the Bailie-depute's consent; as also, the discharge granted by the Procurator-fiscal was gratuitous, there being no part of the penalty paid when the said discharge was granted; or, if there was any thing paid, the Bailie-depute was content to allow *pro tanto*; and, albeit the Procurator-fiscal could have discharged the penalty, yet he could not have discharged the principal obligation, which was to present the person, so that the suspender ought still to be liable in a fine for not presenting his son's person. *Replied,* That the bond being granted to the Procurator-fiscal and the Bailie-depute, by the decret by which it was declared the penalty was incurred, he might discharge the penalty without the Bailie-depute's consent; and having decerned the penalty to be paid to him, which is sufficient to exonerate the suspender, whether there was any money paid when the discharge was obtained or not; and the suspender not being obliged, by the bond, both to present the person and pay the penalty, but only to pay a penalty in case of failzie, the discharge of the penalty extinguishes the bond; and therefore he could not be liable in a fine for not presenting his son's person. THE LORDS found that the Procurator-fiscal might validly discharge; and therefore suspended the letters.

No 1.
A discharge being granted by a Procurator-fiscal of the penalty of a bond incurred by not presenting a person to underlie the law, was found valid, tho' without consent of the Judge.

Fol. Dic. v. 2. p. 211. Sir P. Home, MS. No 904.

See PUBLIC OFFICER.—See APPENDIX.