No 307.
bearing to be the pupil's money.
After many years, the pupil having sought it, it was presumed he had settled accounts with his tutor.

yell and James Arnot debtors, in the name of ——— his pupil, to whom this cedent was tutor, and bearing to be the said pupil's proper monies; and the said debtors being by the bond obliged to pay it again to the tutor's self, his heirs, executors, or assignees, &c.; whereupon the assignee having charged James Arnot to pay, and he suspending upon this reason, that (the monies belonging to the pupil) the tutor, albeit the bond bore that the monies should be repaid to him, could not make any profitable assignation thereof; and that the said pupil being now past the age of minority many years since, it being 34 years, or thereby, since that bond was made, and he hath never sought it, that must be a great presumption for the payment thereof; and if he shall seek it, the suspender shall give him either satisfaction, or then shall be content that sentence pass against him; but he being only bound for James Dalyell, and after so long time, all process ought to cease at this assignee's instance made by the tutor, who could never have made any such effectual assignation of his pupil's monies. The Lords found this reason noways competent for the suspender to allege, he being debtor, and never alleging payment made to the pupil, and the pupil's self not opponing to this charge, for it might be that the tutor in his tutor-compts had charged himself with this article of debt to the pupil, and had taken order with him therefor; for which cause, and in respect that the assignee charger offered caution to relieve him at the pupil's hands, which the Lords sustained and ordained to be received, the letters were found orderly proceed at the assignee's instance. See Tutor and Pupil.

Act. ———. Alt. *Johnston.*

Fol. Dic. v. 2. *p.* 163. *Durie, p.* 805.

1664. *December* 2. Veitch *against* Paterson.

No 308.

After the issue of a tack and full payment of the tack-duty, the tacksman having insisted against the setter for the penaly of L. 100 contained in the tack, incurred through failzie of entering the pursuer into possession at a certain term; the Lords restricted the libel to damages, and found the same not now probable otherwise than by the defender's oath.

Fol. Dic. v. 2. *p.* 163. *Stair.*

*** This case is No 40. p. 11383.

No 309.
A tenant who was bound to leave the houses in repair, removed, and a new

1676. *November* 15. Adamson *against* Marshall.

Janet Adamson charges John Marshall upon a tack, by way of contract, by which "he is obliged to repair the houses in their walls, and to make them wind-tight and water-tight, and to leave them so at his removal. The tenant suspends on this reason, That after the ish of his tack he removed and a new

No 309.
tenant entered, without alleging insufficiency. Still the insufficiency found probable by witnesses.

tenant was entered, without any pretence of insufficiency of the houses, which imports an acquiescence and exoneration of this obligement, and that he was not charged till nine months after; 2*do*, Though any obligation could remain, it were only probable by his oath, that the houses were insufficient, and *in quantum*, or by witnesses unsuspected taken of purpose to visit the houses at his removal, he being warned or present. It was *answered*, That his obligation being a matter of fact, could not be taken away but by implement or discharge, and is probable by oath or habile witnesses, which no law doth restrict to visitors.

The Lords repelled the defence, and found the insufficiency probable by witnesses above exception; but declared, seeing visitation was omitted, that if the tenant would offer to prove that the houses were sufficient conform to his tack at his removal, they would prefer him in the probation.

Fol. Dic. v. 2. *p.* 163. *Stair, v.* 2. *p.* 464.

*** Gosford reports this case:

In a suspension raised at Marshall's instance, who was charged upon a tack of the lands of Spaylaw, for the charges of reparation of the whole houses upon his tack, whereby he was particularly obliged to repair the same at his entry, and to have the same at his removing wind-tight and water-tight, wherein he had failed, as the special charge given in disbursed upon that account by the setter of the tack, amounting to 500 merks bestowed by him for repairing thereof (showed;) the reason of suspension was, that Marshall having bruiked the land by virtue of his tack for the space of seven years, there being a tack set to a new tenant, he did voluntarily remove at Martinmas 1673, and entered the new tenant to the whole houses which were never questioned for want of reparation until three quarters of a year thereafter, nor he ever required to see the houses visited, as being in an ill condition, which is the common custom betwixt masters and all tenants; likeas, the subsequent winter being most stormy, did occasion the ruin of many landwart houses. It was *answered*, That there being a special obligement in the tack, no pretended custom could take away the benefit thereof, and the forbearance to require was but a favour, and there being a special time for doing thereof *dies interpellat hominem*. The Lords did find that the forbearance to require, did not prejudge the setter of the tack; but they did restrict the special discharge to the true condition the time of the removal, and ordained probation to be led for that effect.

2 *Gosford, MS. No* 903. *p.* 582.