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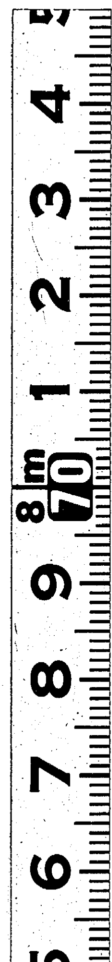

A

LETTER

FROM

A GENTLEMAN in Edinburgh,

TO

His FRIEND in the Country,

CONTAINING

An ANSWER to the PROPOSALS for amending the Law concerning TAILZIES in Scotland.

EDINBURGH:
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[Price SIXPENCE.]

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A

LETTER, &c.

SIR,

YOU desire my opinion of the *Proposals*, lately published, *for amending the law concerning tailzies in Scotland*; I shall give it you freely, and in as few words as the nature of the subject will admit of.

The Proposals, which are in the form of a bill intended for parliament, set out with a preamble, setting forth, that "whereas, by "an act of parliament passed in Scotland in "the year 1685, with a view to the preser-"vation of families, it is statuted and decla-"red, That it shall be lawful for his Ma-"jesty's subjects, to tailzie their lands and "estates, and to substitute heirs in their "tailzies, with such provisions as they shall "think fit: And whereas, in pursuance of "the powers given by the said act, but con-"trary to the purpose and intention thereof, "many tailzies have been made, containing "clauses inconsistent with the cultivation "and improvement of the country, and, at "the same time, restraining the heirs of "tailzie from exercising the necessary powers "over the estate: Therefore, and in order

 to

" to prevent the accumulating and perpetu-
" ating of overgrown eſtates in particular
" families, and the tailzying of ſmall eſtates,
" the rents whereof are not ſufficient to ſup-
" port an honourable repreſentation of the
" family, it is propoſed, *&c.*"

From theſe premiſſes you will naturally conclude, that ſome remedy is to be offered for the many inconveniencies ſet forth in the preamble; but you will find yourſelf much miſtaken. The author of theſe propoſals ſeems to me to have meant no ſuch thing; every ſingle article in his intended bill has a direct tendency the other way, inſomuch that, upon reading his Propoſals, I was in ſome doubts whether the author ſeriouſly means to ſupport entails, or to deſtroy them by making them unſupportable. But you ſhall judge of him from his own words.

Art. 1. " I. That from and after the
" day of it ſhall be lawful to
" every heir of tailzie of any land-eſtate ly-
" ing within that part of *Great Britain* called
" *Scotland*, to provide his wife, or the wife
" of his apparent heir; or if the eſtate is
" poſſeſſed by a female heir, to provide her
" own, or her apparent heir's huſband, re-
" ſpectively, in a liferent, by way of locality
" only; providing the ſame do not exceed
" one third of the free rent of ſuch eſtates,
" after deduction of former liferent-provi-
" ſions,

" ſions, and of the intereſt of ſuch debts,
" real or perſonal, as ſhall then be charge-
" able on the eſtate: And, in like manner,
" to provide their younger children, or thoſe
" of their apparent heirs, in the whole, in
" an yearly liferent locality, not exceeding a
" third part of the free rent of the eſtate;
" which ſhall be redeemable by the granter's
" heir of tailzie on payment of ten years
" purchaſe of the ſaid locality: And the heir
" ſhall alſo be intitled to relief of the fore-
" ſaid proviſions, out of any ſeparate eſtate,
" real or perſonal, that belonged to his pre-
" deceſſor, by whom the tailzied eſtate was
" therewith charged and burdened."

One of the great objections to tailzies in *Scotland*, as they ſtand at preſent, is the incapacity of the heir in poſſeſſion of improving his eſtate under the fetters of an entail. Whether the article now under conſideration tends to remedy this evil, is ſubmitted to your better judgment.

Give me leave only to aſk you a few queſtions, which I beg you will have under your conſideration in reading the article.

—Will a widow, who has nothing to ſupport her but the yearly rent of the lands allotted to her, be able to lay out part of that ſmall ſubſiſtence on the land, in expectation of making her income better?——Can it be believed, that ſhe will ſtarve herſelf for the good of the heir,

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heir, who may perhaps be a mere ſtranger to her?——Will the younger children of an ancient family, bred up under the high notion of the antiquity of their family, ſtoop to the plough and turn farmers, in order to improve a ſmall portion of land allotted to them, and which may be redeemed by the heir for ten years purchaſe?——Or will they not rather chuſe to ſqueeze the tenants to raiſe a ſum for their education and outſet in the world?——If ſuch younger children are infants, will it not be neceſſary to put the management of the lands allotted to them in truſtees?——Will ſuch truſtees ever think of laying out either their own, or the money of the truſt, in improving the land?——Will it not be more prudent for them to make the moſt of the rents they can in the mean time, by a racked rent? In ſhort,——can there be any hopes of improvement of the land, by a ſet of poſſeſſors who have no intereſt in the eſtate, but what muſt depend upon the contingency of their own lives; and who can have no means in their hand to carry on any improvement, were their inclinations to do it ever ſo ſtrong?

To all theſe queſtions I know you will anſwer, That theſe inconveniencies ſeem all to be removed by the ſubſequent part of the clauſe; which impowers the heir of entail in poſſeſſion to redeem all theſe liferents, by payment

payment of ten years purchaſe; but let me aſk you one queſtion more, and I ſhall have done upon this head: How many heirs of entail in *Scotland* at any one time have a ſum lying by them equivalent to ten years purchaſe of a third part of their eſtate? And, if they have not, by what means are they to get credit to borrow that money, unleſs power ſhall be given them to charge the entailed eſtate therewith.

Art. 2.

"II. That it ſhall be lawful to every heir "of tailzie, to grant leaſes of all, or any part "of the lands or heritages contained in ſuch "tailzie, for any number of lives not exceeding three lives, or for any term of years "not exceeding two nineteen years, and the "life of the tackſman who ſhall be in poſſeſſion at the expiry of the ſaid ſpace: And "alſo, it ſhall be lawful to grant feu-rights "of any part of the lands contained in the "tailzie, with the ordinary and uſual clauſes "contained in feu-rights by the law and "practice of *Scotland*, which ſhall be valid "and effectual to the receivers thereof: Providing always, that the tacks or leaſes ſhall "be granted for a rent or tack-duty not under what the lands do pay at the date thereof; and alſo, that the feu-duties ſhall not "be under the rent payable by the tenant at "the time; and that the feu-duties ſhall be "wholly payable in victual, to be computed "at

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" at the usual value in the country, although
" the rent before feuing may have been pay-
" able in money; and that the tacksman and
" feuer shall be taken bound to pay a year's
" rent to the heir in possession of the estate
" at the end of every nineteen years; and
" there shall be no other *duplicando* of the
" feu-duty at the entry of the heirs.

" Providing also, that no such tack or
" feu-right, nor any liferent granted to wives
" or husbands, nor provisions to children,
" shall affect the manor-place, where the fa-
" mily have usually made their residence, nor
" a reasonable part to be set aside for policy
" at the sight of the court of session; but that
" the same shall be free of such burdens, and
" shall not be set in tack for longer time than
" for the lifetime of the granter: And also
" providing, that the superiorities of all feus
" granted in virtue hereof, shall remain with
" the tailzied estate unalienable, in all time
" coming, and shall be excepted from the
" power given by the act 20° *Geo*. II. to heirs
" of tailzie to convey their superiorities to
" their vassals."

This article contains two propositions: *First*, That the heir shall have power to grant long tacks; and, *secondly*, That he shall be impowered to grant feus under certain conditions. At first sight, both these propositions seem to be reasonable; but when they are

are duly considered, you will find that they are a bar to the cultivation of the land, and in the end must destroy civil liberty.

The motives which induce an heir of entail to grant a long tack or feu, are usually the same with that of a liferenter. Being tenant only for life, an heir of entail is often straitened in his credit and circumstances. The natural and most speedy relief that must occur to him upon such an occasion, is to raise a sum of money, either by way of grassum or fine, upon letting as long tacks of his estate as he can, or by granting feus: both which, in the shape proposed in the bill, must be a great bar to cultivation; because, by either of these methods, the proprietor will be deprived of the power, and the tenant of the ability of improvement. The proprietor, you will observe, will be denuded of the natural possession, and the sum which the tenant must pay for his right, will necessarily drain him of his ready money; or if he has it not, he will be obliged to borrow, at the heavy charge of 5 *per cent*. In these circumstances, what can a tenant do towards the improvement of the land? He is even, by this article, tied up from laying his grounds in grass, the only means of improvement left him; for, if he is obliged to pay his rent in victual or grain, he must grow corns, though his grounds are not proper for it; and he must even increase his tillage in proportion to the bad condition of the ground, that he may

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may have a ſufficient quantity of grain to deliver to the proprietor for his rent.

The laſt part of this article ſeems to be deſtructive of the liberties of the country. It is the privilege of a *Britiſh* ſubject to be taxed by his own conſent, or at leaſt with the conſent of his repreſentative in parliament; and the perſon who pays the tax ought to have a vote in the choice of the member who is to lay it on. Accordingly, to enlarge this privilege as much as poſſible, and to deſtroy that dependence which vaſſalage naturally creates, the wiſdom of parliament, not many years ago, in the reign of our late moſt gracious Sovereign, thought proper to impower the heirs of tailzie to ſell to their vaſſals the ſuperiorities of their own lands. The proviſion in the article now under conſideration, entirely deſtroys that wiſe meaſure, and will naturally ſeparate the property from the ſuperiority for ever; and the vaſſal who pays the taxes upon the land, having no vote in the choice of the perſon who is to repreſent him in parliament; the privilege of electing and being elected, muſt fall entirely into the hands of the great entailed ſuperiors, who will have no other intereſt in their eſtates, than that of taking an annuity out of them for life.

The 3d, 4th, and 5th articles of the Propoſals ſeem to be reaſonable.

Art. 6. "And in order to make tailzies fully ef-
" fectual, according to the true intent there-
" of,

" of, it is propoſed, That it ſhall be declared
" lawful to all heirs of tailzie, whether near
" or remote, to declare the irritancies thereof,
" againſt the heir in poſſeſſion; and if the
" purſuer prevail, he is to be intitled to dou-
" ble coſts of ſuit. But the irritancy decla-
" red, ſhall not prejudice the right of the
" contravener's creditors, to affect by dili-
" gence the rent of the eſtate during the life
" of their debtor. And that the contraven-
" tion of the proviſions in entails ſhall only
" operate an irritancy or forfeiture of the
" right of the perſon contravening, and ſhall
" not affect any other heir, though deſcend-
" ed of his body."

This article ſeems to be contrived to encreaſe the number of law-ſuits: for although a remote heir cannot take any benefit by declaring the irritancy while a nearer heir ſubſiſts; yet as he is to be intitled to double coſts of ſuit if he prevails in the action, he will not ſcruple to haraſs the heir in poſſeſſion upon every occaſion.

Art. 7. "Where an heir of tailzie, by incloſing,
" or otherwiſe, improves the value of any
" part of the tailzied eſtate, other than the
" manſion-houſe, and policies adjacent there-
" to, his aſſignees or creditors ſhall be in-
" titled, within the ſpace of one year after
" his death, to demand from the ſucceeding
" heir a tack of the land ſo improved, for
" the ſpace of two nineteen years, and a life-

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"time, for payment of the old rent paid by "the tenants before improvement, and a "year's rent, by way of graſſum, at the end "of each nineteen years: But this tack to "be redeemable from ſuch aſſignees or cre- "ditors on payment of twenty years purchaſe "at any time within ſeven years after the "granting thereof, but not afterwards."

Beſide the inconvenience of innumerable law-ſuits which this article may occaſion, it will have this obvious conſequence, namely, to diveſt the heir of entail for the time being, of all kind of connection with the eſtate, excepting that of taking an annuity out it. This article alſo ſeems to be inconſiſtent with the proviſions in the firſt part of the bill; for if the whole eſtate ſhall be let to the aſſignees or creditors of the laſt incumbent, in what manner ſhall the wife and children of the heir for the time being, be provided to their localities? At leaſt, they will be deprived of the natural poſſeſſion, and will be reduced to accept of their proportions, not according to the rent for the time being, but according to an ancient low rent.

It is indeed true, that by this article the heir has it in his power to redeem this long tack by payment of twenty years purchaſe at any time within ſeven years after the granting thereof. That is to ſay, in other words, he is to have the extraordinary privilege of purchaſing his own eſtate at twenty years purchaſe;

purchaſe; and at the ſame time, to be ſubjected to all the inconveniencies and fetters of an entail; nor will it be in his power, after ſeven years, even to make uſe of this privilege, ſmall as it is.

The 8th article ſeems to be reaſonable.

Art. 9.

"That if any eſtate limited by an entail "made or to be made, ſhall exceed *L.* 18,000 "Scots of valued rent, then the ſurplus "of the eſtate ſo tailzied, ſhall, from and "after the day of "belong to the heirs of tailzie, as a fee unlimited: And it ſhall be competent to any "heir in poſſeſſion at the time, by a proceſs "before the court of ſeſſion, in which all the "ſubſequent heirs of tailzie on life ſhall "be called, and the parents or guardians of "ſuch as are minors, to aſcertain particular "lands to the extent of L. 18,000 Scots of "valued rent, over and above the manorplace and policies; and to declare, that "the ſame are affected by the limitations in "the tailzie; and that the remaining lands, "though therein comprehended, ſhall, in al "time coming, belong to the heirs of tailzie "in fee unlimited, and ſhall not be affected "by any of the prohibitive, irritant, or reſolutive clauſes in the tailzie; but ſhall be "at the full and abſolute diſpoſal of the heirs, "and affectable by their debts and deeds, in "the ſame manner as if ſuch lands had not "been ingroſſed in the tailzie."

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According to the conception of this article, it is not eaſy to diſcover whether the author of the Propoſals means to limit the perſon or the entail. I ſee nothing in this article which can prevent the entailing of lands to any extent, provided the maker of the entail ſhall uſe the precaution of doing it by ſeveral deeds, and that each eſtate ſhall not ſeverally exceed the ſum limited, (which is a pretty large one). Nor does the article make any proviſion againſt the accumulation of entailed eſtates by ſucceſſion. But in caſe ſuch accumulation is intended to be comprehended under this article, I ſhould be glad to know which of the eſtates ſhall be deemed to be in fee ſimple; or what method or rule the court of ſeſſion could lay down to declare the overplus? In ſhort, in place of providing a remedy, this article will be productive of much miſchief, and, if I am not miſtaken, will give riſe to innumerable law-ſuits.

Art. 10. "That no eſtate, whereof the valued rent "is leſs than L. 2000 Scots, ſhall be affected "by any tailzie, either made or to be made; "but the ſame ſhall belong to the heirs of "tailzie as an unlimited fee."

This article ſeems to be in the true ſpirit of the ancient ſyſtem of ariſtocracy. If the preſervation of a name and family be an advantage, why is the honeſt induſtrious gentleman of ſmall fortune to be denied this privilege? The entailing of ſmall eſtates is not the

the preſent cauſe of complaint; for, though it may hurt individuals, it can never hurt the Public. It is the accumulation of wealth in one perſon, and the locking up of that property for ever, which the nation now complains of. Shall we then diſarm the ſmall proprietors, and prevent them from putting their eſtates in ſuch a ſituation as not to be ſwallowed up by their great neighbours; and, at the ſame time, ſhall we enable the noble, the rich, and the powerful, to acquire theſe very eſtates, and to ſecure them for ever to themſelves and their families? This would be a partiality with a witneſs, and a certain means of enſlaving the nation, and of ſubjecting a people now free, to the vaſſalage of their ſuperiors.

The 11th article ſeems to be reaſonable.

The author of the propoſals next proceeds to argue againſt the reſtricting of the endurance of entails, and alleges, "That ſuch "reſtriction is the ſame as to propoſe that "no tailzie ſhall ever be made in *Scotland*, "as no man there will chuſe to execute a "ſettlement, which is to limit only his im- "mediate ſons who are in life at the time, "and leave all the remoter heirs with "whom he is leſs connected, at liberty to "diſſipate the eſtate as ſoon as it devolves to "them, free and diſincumbered of the re- "ſtraints and diſabilities which he had laid "upon his ſons; and the other *heredes prae-* "*dilecti*,

" *dilecti*, whom he ſaw and knew at the " time."

This argument, though ingenious, like many other of that ſort, has the misfortune to be contradicted by experience: for though in *England* tailzies are only effectual to the perſons named in the deed; yet we do not find that ſuch reſtrictions have had the conſequences here foretold. A man naturally wiſhes to ſecure the exiſtence of his family as long as he can; if he cannot create a perpetuity, he will naturally endeavour to ſecure a ſucceſſion, for as long a time as the law allows; and there are often many reaſons which may induce a man to reſtrain even his own ſons, who may be profligate, and of a diſſipating diſpoſition, which will not ſubſiſt when the eſtate is to devolve upon a perſon unborn, whoſe diſpoſitions the maker of the entail has no reaſon to be afraid of.

The Propoſals conclude with ſaying, " That the ſubjects of this country have " long found themſelves happy under their " preſent ſettlements: That the import of " contracts of marriage, and of tailzies under " the act 1685, are, by long experience, " well known; and that every queſtion al- " moſt that can occur has been aſcertained " by deciſions of the court of ſeſſion, af- " firmed by the houſe of Lords: and that " ſuch ſettlements are therefore in no dan-

" ger in giving riſe to new diſputes. But " that if a new kind of ſettlement were to " be introduced, unknown to the law and " practice of this country, and founded on " principles which bear no analogy to it, it " is not to be foreſeen what confuſion would " thence ariſe. That the chief objection " now made to the preſent tailzies, is their " perpetuity. But that this is not the cir- " cumſtance in which the people hitherto " thought themſelves aggrieved. That the " hardſhips complained of have been the " want of reaſonable powers to provide " wives and children; to clear the eſtate of " debts affecting it; the accumulating of " great eſtates without end or bounds, ſo as " to exclude the cultivation and improve- " ment of the country, by diſabling heirs " to grant feus, or long leaſes, without " which it cannot be carried on. And " that theſe inconveniencies are meant to " be remedied by the amendments pro- " poſed. At the ſame time, if it ſhould be " thought to be inexpedient that tailzies " ſhould be extended through many ſucceſ- " ſive ſeries of heirs, that this may be re- " medied, by limiting tailzies in time coming " to the heirs of blood of the maker, or e- " ven to thoſe deſcended of him, or his fa- " ther, or grandfather, allowing the ſame " ſtill to be extended to heirs male collateral, " of whatever degree."

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The truth of these propositions will best appear from the facts themselves. The number of questions on the import of entails daily litigated in the court of session, do not afford very convincing evidence that every question that can occur upon them is now settled. It is but lately that, contrary to the opinion of the most part of the learned lawyers in *Scotland*, it has been found, that a tailzie made before the act 1685, must be subjected to the rules laid down in that statute. This was first started by an ingenious gentleman, who, contrary to his own expectations, succeeded in obtaining that decision. Other points may be started with the same success.

Many of the counties of *Scotland* have very lately made a public declaration of their wish for an alteration of the laws concerning entails. Sensible of the many inconveniencies that attend the creation of perpetuities, and the accumulation of wealth in great families, some of the subjects of *Scotland*, who have a personal aversion to tailzies themselves, have entailed their own estates, on purpose to prevent their falling into the hands of their more powerful neighbours; an instance of which has very lately occurred to me in my own practice. These facts convince me at least, that our author must be mistaken, when he asserts, that the nation is satisfied, or that no question

question can occur on tailzies which has not been already determined.

I heartily agree with the author of the Proposals, in thinking that if a new kind of settlement were to be introduced, unknown to the law and practice of this country, and founded upon principles which bear no analogy to it, it must be attended with very bad consequences. At the same time, as the gentleman does not point out any such novelty in the alterations of the law now proposed, I cannot form any judgment of what he means by this paragraph. I know it has been said, that abolish tailzies, and you will soon have trust-deeds in their place. But of this I think there is very little danger, if the plan proposed by the faculty of advocates shall take place; because, if I understand it, the faculty do not mean to destroy tailzies, but to limit their duration. By their plan it will be in the power of proprietors to entail their estates to any person existing at the date of the entail. This tailzie will surely endure for as long a time as it is possible to create a trust. I can therefore see no good reason to be afraid of trust-settlements, while we can attain the same end by executing tailzies, the effect of which is so well known.

By the act 1685 it is declared, *That if the provisions and irritant clauses of an entail shall not be repeated in the rights and conveyances whereby*

whereby any of the heirs of tailzie shall enjoy the tailzied estate, the said omission shall import a contravention of the irritant and resolutive clauses against the person and his heirs who shall omit to insert the same; but shall not militate against creditors and other singular successors, who shall happen to have contracted bona fide *with the person who stood infeft in the said estate, without the said irritant and resolutive clauses in the body of his right.*

If it shall be thought proper to make an alteration in our law, and to restrict tailzies to the persons named in the substitution; I should think the most natural and easy way of doing this would be to enact, That when an heir not named in the substitution of the entail, shall serve himself as heir of provision in the entail, it shall be lawful for such heir to omit and leave the resolutive and irritant clauses out of his title-deeds; and that such omission shall not import a contravention of the irritant and resolutive clauses against such person or his heirs, any thing in the act 1685 or the deed of entail notwithstanding.

This would effectually restrain proprietors from creating perpetuities, and at the same time preserve entire the present mode of conveyance.

I am,

Edinburgh, Aug. 24.
1765.

SIR,

Yours, &c.