propose to do. But to take no concern whatsoever about it, saying it "may safely be left to the guidance of Providence," is to leave it *not to the guidance of Providence, but of that part of the nature of man which he has in common with the brutes.*

I have now considered most of the objections that have been made to the views of Malthus, and firmly believe that they have proved impotent to shake his theory. I believe *prudence in the matter of marriage*, Malthus' preventive check, to be the sole means whereby the condition of the labouring classes can be *permanently* ameliorated; while I would be far from disapproving of any change in the law calculated to give them a greater command over the comforts of life, though the improvement would be only temporary unless they were brought to regard these higher wages *as indispensable*, and so to refrain from a multiplication so rapid as by an undue increase of the supply of labour would necessitate the forfeiture of them. It is true that "the preventive check" exercises greater influence now than it did a century since; but it is not true that its influence is as great as every well-wisher of the labouring classes should desire to see it. Every effort accordingly should be made to strengthen its influence. It should be impressed on these Gibeonites, these hereditary bondsmen, that would they be free, themselves must strike the blow. "It should be understood," says Dr. Chalmers, "that the labouring classes have, in this way, though in this way only, their comfort and independence in their own hands. They are on high vantage-ground, if they but knew it; and it is the fondest wish of every enlightened philanthropist, that they should avail themselves to the uttermost of the position which they occupy. It is at the bidding of their collective will what the remuneration of labour shall be; for they have entire and absolute command over the supply of labour."

In conclusion, I would beg of you to bear in mind, lest I should appear presumptuous, as though I were setting *my* opinion against that of Dr. Lawson and Professor Rickards, that the views I have laid before you are not my own. "Non *meus* hic sermo, sed quæ præcepit Ofellus." The theory is not *mine*, but one which Malthus was the first fully to develope, and which has subsequently been endorsed by Ricardo, Chalmers, Mill, Senior, and other illustrious names. I have merely annexed *my* name to that distinguished catalogue.

VII.—*On Partnership with Limited Liability.*—By P. J. M'Kenna, Esq.

GENTLEMEN,

Although I have, on a previous occasion, brought this question under the consideration of the Statistical Society, yet such is its importance, and such the difficulty which those appointed to inquire into the subject entertain, that I feel but little hesitation in returning to it, and deem that little apology will be required for again

trespassing upon your time. Since I had the honour of submitting to this Society the paper prepared by me on the subject of limited liability, a Commission composed of eminent and learned men, entrusted with the task of taking evidence and reporting upon the subject, has closed its inquiries, and submitted a report as the result of their investigations. It must be a matter of regret to the numerous advocates for the introduction of the *commandite* system, that the very eminent men of whom that Commission was composed, have been unable to come to a conclusion favourable to the proposed change in our laws of partnership. I shall take the liberty of calling your attention to the evidence taken before the Commission, and the report of the Commissioners; but before doing so, I should wish to notice some rather ingenious objections to the *commandite* system, while may be found in a series of articles upon the subject, contained in several numbers of the *Law Times* during the latter part of the year 1854.*

The ordinary objections of over-trading, unnecessary change, dangerous innovation, injustice to creditors, have been already fully considered. There is, however, somewhat of novelty in some of the reasons given by the writer referred to, which are urged with sufficient cleverness to render them deserving of an answer. The writer commences by defining "limited liability," as a system under which certain persons shall not, under certain circumstances, be liable to pay their debts. Now, the fallacy of that definition consists in assuming that the debts in question are the debts of the person proposed to be secured. With much more propriety might the Statute of Limitations, which provides that after the expiration of a certain number of years, debts shall be barred, be called a provision that certain persons under certain circumstances should not pay their debts. There are several objections of this kind put forward, involving the same fallacy, viz., taking for granted that the debts of the firm are the debts of every individual who advances money to the firm, and receives in return a portion of the profits. By the law as at present existing, it is true they are his debts; but if we find that law an arbitrary law, based on no reasonable grounds;—nay, more, opposed, as far as our judgments enable us to form an opinion, to expediency as to natural justice,—are we not begging the entire question, by stating that the proposed change would be a law to enable certain persons to escape payment of their debts?

It is admitted by the writer of the articles referred to, that to make a man who is entitled to receive but a hundredth share of the profits liable to his last penny, it may be for a tenth or for the whole of the losses, would be grossly unjust; but he argues, if injustice is to be done, if some person must suffer, it is more equitable that the sleeping partner should suffer, as he does at present, than that the creditor should be at a loss, as he would under the *commandite* principle. That is, however, a proposition, the truth of which I deny. The man who lends his money to a firm, and is to receive in return a share of the profit, no matter how small, is at the mercy of every person connected with the management of the firm who has power

* Nos. for 8th April, 1854; 27th May, 1854; 29th July, 1854.

to contract for it. He is entirely without protection. If he lend £100, and is to receive a five hundredth part of the profits, he is liable to his last farthing for the debts of the partnership, no matter how contracted. Under the limited liability system, the creditor would in several respects be placed in a much more advantageous position than the dormant partner under our existing law. He would have a full discretion as to how far he would give credit to the company; he could not be committed by the acts of any third person; he would have full means of knowing the capital and resources of the partnership, much fuller than the creditors of firms now possess, and any risks that he would run would be only such as are inseparable from every trade in which credit is given.

It is said by the writer referred to, that the advocates of limited liability have put forward the following arguments, which he attempts to refute as utterly fallacious. Let us consider how far he has been successful. It is a favorite argument for the *commandite* partnerships, that if persons are willing to deal on those terms of limited liability, they should be permitted to do so. This he states to be, in other words, enabling a man to avoid the payment of his debts, by giving notice that he would not be answerable for them. Here, as before, in his definition of limited liability, he begs the entire question, by assuming the debts of the firm to be the debts of every person who has advanced money to the firm on certain terms as to the use of their capital. There are no complaints against a law which permits limited guarantees to be given; and what substantial difference there is between one who becomes guarantee to a certain amount for a firm, and one who advances the same sum to a firm, it would be difficult to ascertain. Again, it is said that there is no necessity for any such law; that if the speculation be a prudent and reasonable one, there will always be found people ready to advance their capital to carry it on; and that those who object to an unlimited liability must have some knavish design of defrauding those who enter into contracts with firms formed on the *commandite* principle. This is not so; and we have only to look at those Joint Stock Companies which, organized under the principle of limited liability, have been productive of such great benefits both to the country and the individuals whose capital is engaged in them, and ask what possibility would there have been of effecting such great results, if we had clung obstinately to our present principle of unlimited liability in partnerships. Instead of saying that none but a knave would ask for the protection which a system of *commandite* partnerships would give him, it would be more correct to assert that none but a fool would place his entire property in peril by advancing capital to a number of men, no matter how high his opinion of their integrity and prudence, under the present system. At the risk of repeating what I have written on a former occasion, as regards the protection of third parties dealing with such firms, I would ask what sense is there in refusing permission to a capitalist to advance his money as a dormant partner, and receive a share of the profits which would leave at least the contributed capital to answer the demands of creditors, and at the same time allowing the capitalist to advance money to a firm, and receive 25 per cent. for it as he may now do, and

permitting him to come in, in case of insolvency, and claim as a creditor on the estate, instead of contributing, as he should do under the limited liability, to the fund for the payment of creditors? There is no system of trading, no recognized mercantile custom which is not liable to abuse and open to objections, and it would seem much the more reasonable way to judge of partnerships with limited liability, to compare them with existing customs and laws, and thus, after we have recognized in them principles of good and the means of supplying existing wants, let us ascertain whether they are not at least as free from evil if not less objectionable than existing laws. The writer in the *Law Times* concludes by recommending a course which, to a certain extent, concedes the principle which he is opposed to, and is open to one of those *sensible* objections which he has urged to the justice of *commanditaire* partnerships. His plan is that such partnerships might be formed, but that they should only have power to deal for cash, and that third parties should be bound by a notice to be given, that no credit would be taken by these firms. Now is not this plan open to the objection already suggested by him, as to the injustice of allowing notice of any kind to interfere with or limit the liabilities of the parties concerned in such firms? and might we not object to this plan what he has already said of *commandite* partnerships generally, that it is a provision that, by giving notice, the parties concerned should not be liable to pay their debts? Such are the absurd contrarieties into which the opponents of *commandite* partnerships are led, in their endeavours to oppose a system against which no fair tangible objection can be urged. It would be a much safer course for those who oppose the introduction of the *commanditaire* principle, to confine themselves to general observations with which it is almost impossible to grapple, and to denounce any change as uncalled for, dangerous, opposed to existing principles, subversive of public credit, and leading to rash speculation and over-trading. By condescending to details, they are certain to find argument after argument either swept away, or, as in many instances, answered by its predecessor. I am aware that in more than one publication there have appeared articles condemnatory of the proposed change, and the only sentiments which such attacks can excite in the mind of any man who has considered the subject, are those of wonder and regret that writers will continue to repeat objections all of which have been already answered, as if repetition could add weight to what is trifling or give importance to absurdity. I regret being obliged to speak almost flippantly upon so grave and important a subject, but the pertinacity with which its opponents have rung the changes upon the same obsolete and futile objections to an amendment in our laws of partnership, would seem to require to be exposed to ridicule rather than met with serious reasoning and remonstrance.

It would be a grave matter to differ in opinion from the learned Commissioners who have reported upon this question, and to me most disagreeable to reflect upon the judgment of a body containing amongst its members two most distinguished judges, one a member of the Irish, the other of the English bench. I speak of the present Master of the Rolls in this country, and Mr. Justice Cresswell. When I find, however, that the members of that Commission differed in

opinion, and that the report was approved of but by a bare majority, as far as I can learn, I do not feel much hesitation in questioning the propriety of their decision and the accuracy of their opinions, the more especially when I have, to support my views, almost every legal man of eminence both English and foreign, political economist, and mercantile man who has given evidence upon the subject. It is also deserving of remark, that while the five other Commissioners give their opinions upon the subject separately in an appendix to the report, and more or less detailed reasons for those opinions, the two principal members, the eminent judges whom I have before mentioned, are silent upon the question, and leave us so completely in the dark, that, for aught we know, they either did not take part in the discussion or took opposite views. Be that as it may, the difference of opinion amongst the Commissioners leaves me at liberty, without assuming any extraordinary boldness, to question their decision, and inquire how far the reasons offered by some of them for taking an unfavourable view of any change or modification will bear scrutiny.

The report, (which certainly, as far as weight of evidence goes, seems hardly justified by the testimony of the parties examined), and also the detailed statements of Lord Curriehill, contain every objection previously argued against the system of limited liability, and already answered by those who have written in favour of the proposed change. I shall therefore content myself with taking up any new objections which have been suggested, or any old ones presented under a new form. In the report, one of the reasons given for deciding against any change is, that the Commissioners cannot discover any evidence of the want of a sufficient amount of capital for the requirements of trade. If one wished to special plead, it might be said that this is not what we complain of; our complaint is, that though there is capital in the country, it is not as freely invested in trade as it might and ought to be. The meaning, however, of the framers of the report evidently was that they had no evidence that trade suffered for want of capital, or that it might be extended if capital were to be more readily obtained for trading and manufacturing purposes. Now this is hardly a fair observation, as it puts the advocates of limited liability to prove a negative. We cannot deny that trade and manufactures are flourishing under the existing system. Does it follow from that fact that therefore there is no want of capital for trade? In discussing this point, some little confusion may be involved in explaining the word *want*. There is, in the sense it is used here, a want whenever more can be effected by an increased investment. In one sense it could hardly be said that the merchant who is worth a million is in want of capital; and yet, in the sense of the word as used here, and as regards this question, he wants capital no matter how immense his resources, as long as there is a field open or that can be opened for the employment of additional capital. How wide, then, would be the inquiry, and how difficult, if not impossible, to give anything like satisfactory evidence that there are branches of trade and manufacture which could not be further extended, and which would not reward increased industry and additional capital. Our reason tells us, and there are few who

would dare to deny, that if the reasonable protection which a system of limited liability would give the small capitalists were assured to them, an immense addition would be made to our trading and manufacturing capital. That the capital is in the country, and not in trade to the extent that it ought to be, or would be, under a fair law, is evidenced by the high price of the funds and the low rate of interest with which fundholders are contented. The report, for the reasons above offered, is safe in saying that the Commissioners had not evidence to satisfy them that there was a want of capital for trade. With the evidence they had before them, however, unless they came to the conclusion that the trade and the manufactures of the country did not admit of further extension, or that a further extension would not be desirable, they could not venture to say there was no want of capital for trade, or, to speak more accurately, that trade did not want more capital.

Another objection to the limited liability system, suggested in the report, and possessing somewhat of novelty, is that the new system would not tend to raise the reputation of British merchants either at home or abroad. I take it, by reputation is meant character and credit. Now, without entering into the discussion of so wide a general proposition, or how far the reputation of British merchants requires to be raised, it is odd, and if the subject were not so grave, would be amusing to find that this statement, whether supported by fact or not, answers one of the most serious and strongly urged objections to a system of limited liability, viz., that it would lead to over-speculation. Now, if the report be correct in the above statement, it would appear that the effect of the limited liability system would be to put those parties dealing with such firms more upon their guard, and instead of encouraging a system of reckless trading and credit, would have precisely the opposite tendency. Another objection has been put forward in the report, which, in addition to its novelty, is somewhat difficult of comprehension—that partnerships trading under the present system would be exposed to an unfair competition with those founded on the limited liability principle. It would have been only reasonable to expect that in dealing with a subject of so much importance, which had previously occupied so much time and consideration, and upon which the Commission had taken such a mass of evidence, those members of the Commission who composed the majority would, in their report, have gone at greater length into the merits of the question, and illustrated important general observations like that last mentioned. The only interpretation that suggests itself of this last objection is that partnerships with limited liability would be able to play a more hazardous game in the way of trade with greater safety, or rather at a smaller loss, than the firms subject to an unlimited liability. As I have already pointed out, the report pronounces positively that the effect of legalizing *commanditaire* partnerships would be to check somewhat the confidence of persons dealing with British firms; and as such persons could be justified in looking with suspicion only on those firms which had this protection, the *commandite* firms would not be able to play so extensive a game as the other partnerships, and would have in this way (and properly so) a more limited credit than the firms con-

ducted under the old system; and thus in proportion as its members were protected, would third parties, in dealing with the *commandite* partnerships, exercise a caution, and limit their credit and contracts. The Commission of 1851 expressed themselves upon this subject with a caution which one could hardly expect to be surpassed; they went so far, however, as to recommend that capitalists might be at liberty to advance money to firms for any period not less than twelve months, and receive in return such share of the profits as might be agreed on by the parties, without being liable beyond the amount of their loan, which was to remain to answer the demands upon the firm. A provision of this kind, although far from being adequate, was yet a step in the right direction, and conceding as it did the advantages of the system, should have been gladly accepted as so much wrung from the neglect and prejudice of legislators. This last Commission is, however, much more cautious, or rather much more averse to any change than its predecessor. When I say Commission, I would wish to be understood as speaking of the majority who settled and approved the report, and not of the entire body.

Three members of the Commission, Lord Curriehill (Mr. Marshall), a member of the Scotch Bench, Mr. Anderson and Mr. Robert Slator give at some length, in an appendix to the report, their reasons for opposing the introduction of the *commandite* principle. Most of these are repetitions of objections previously urged and answered. On reading them over, I found a few observations to which I should wish as briefly as possible to direct attention. One of the first observations of Lord Curriehill is that an Act of Parliament in Ireland (The Anonymous Partnership Act) legalized the formation of partnerships on the *commandite* principle, and that it has fallen almost entirely into disuse; and he argues from this, that if the *commandite* principle were introduced, so little desirable would it be found, that people would not avail themselves of it. It is hardly excusable that one appointed to so important a function, bound in duty to inquire fully into a subject of such vast importance, should either have glanced casually at this Act, without going carefully through every section; or if he had done so, and found, as he might, restrictions and conditions imposed quite sufficient to deter persons from associating under that Act—restrictions and conditions, to which in my former paper I called the attention of the Society—that he should have entirely omitted, either from negligence or design, adverting to this all-important fact. I am happy to find that that most eminent judge, and perhaps one of the highest authorities in either country upon such a subject, (the Ex-Chancellor of Ireland, the Right Honorable Francis Blackburn) approves of the *commandite* principle, and considers that the Anonymous Partnership Act, by the unnecessarily stringent provisions which it contains, renders the concession almost useless. In a letter which he did me the honor of addressing to me on the subject, he says, "I always thought that the principle of our Act respecting Anonymous Partnerships was right, and regretted that it was frustrated by the provisions which clogged its operation." In thus referring to the opinion of Mr. Blackburn, as regards the principle of limited liability, it must be understood that he has not adopted a conclusive

view of the subject, or of the means of rendering it effectual and safe. Lord Curriehill considers that as the *commandite*, or dormant, partners were, from their connection with the firm, co-owners of the partnership, co-borrowers of the money lent to the partnership, and co-contractors for the dealings of the firms, they should therefore be jointly liable. Granting all this, it is difficult to perceive how rights of this kind, as regards the partnership property and contracts, rights which only affect the partners *inter se*, should make any difference with regard to third parties. The fact that such partners are entitled in particular proportions to the stock and profits of the co-partnership, when this right is subject to the paramount claims of creditors, cannot affect those creditors. The question as to injustice is shortly this; the *commandite* partner says, "To a certain amount I make myself liable for the debts of this firm." With what show of reason can the creditor say, "You are entitled to receive a fourth of the partnership property, and although that claim is subordinate to mine, cannot affect mine, and although our contract was that you should be answerable for the engagements of the firm but for a certain sum, yet because you have as against your co-partners certain rights, which do not interfere with mine, you should be liable to your last penny for all their contracts, no matter how improvidently I may deal with them.

Another objection offered by Lord Curriehill is that third persons who enter into contracts with *commanditaire* firms, would not be parties to the contract which limited the liability of the *commanditaires;* and of this he gives the following example:—A and Co., of Glasgow, order goods of a merchant in London. The merchant knowing B, who is one of the *commanditaire* partners, to be a man of substance, supplies the goods on the credit of B, knowing nothing of B's limited liability, and when he is compelled to seek for payment, finds B sheltered by this proposed Act, and liable only to a certain extent. In advancing this argument, the learned commissioner loses sight of the important fact that A and Co., on their front, and by their co-partnership name would, according to the proper provision, intended to be inserted in the limited liability, disclose the fact of their being incorporated under that Act; and that the merchant of London, if he knew by their title that the firm was *en commandite*, and by sending to the public office appointed for the purposes of registration, he could ascertain the exact amount of B's liability, could hardly complain that he blindly supplied the goods on the credit of B's fortune.

After considering the effect of the proposed change on third parties, and the injustice likely to be inflicted on them, his attention is next directed to the protection of the persons composing such firms; and he proceeds to point out the unfair position in which the active partners, who should be liable *in solido*, would be placed, and the likelihood of persons of small capital foolishly engaging in such concerns; that the acting partners would lose their entire property by being forced by the *commanditaires* into wild speculations; and that they would lose the money invested by their hurrying to realise by hazardous engagements, large profits, relying on their limited liability. Now, in order to enter into hazardous, or any

other kind of speculation, there must be two parties; and it has been already put forward by the report, that parties would be slow in trusting such firms. It would be thus out of the power of the *commanditaires*, even if they were such desperate adventurers as it is taken for granted they would be, to engage in those extensive and dangerous undertakings as suggested. Even if they had both the will and the power to act thus, it must be borne in mind that it is quite beyond the province of a legislature to provide for the safety of fools and knaves, and that a want of ordinary caution and prudence in the management of affairs, can never be supplied by any code. It would be just as wise to forbid persons to lend money to any individual or body, lest they should foolishly trust their capital on insufficient security, as to say that *commanditaire* partnerships should not be permitted, lest people should rashly engage in them. It will be found that this observation answers every class of objection raised as to the danger to which the parties concerned in such firms would be exposed.

The case of young men of good character and intelligence, who have not means, and may be forced for the purpose of obtaining capital from their friends, to stipulate for a division of profits, which under the present law they cannot do with safety to the lenders, Lord Curriehill is disposed to think a hard one. Even here, however, he is sternly opposed to change, and suggests the following practical means of obviating the difficulty; that such young men should incorporate into every contract into which they should enter a proviso, that the persons who had lent them money, and who were, according to the partners, as being entitled to a share of the profits, should not be liable for those engagements. Now if we bear in mind that each person advancing money to a young man, and who in return should stipulate for a share of the profits, would place their entire fortune at his disposal, and thus leave the existing objection to claims of this character as it is at present, the perfect uselessness of the plan will be apparent; and if we consider, besides, the difficulties which any young man would experience in going to a merchant to purchase goods, or to a banker to get bills discounted, and making such a novel proposition, we shall hardly be disposed to give Lord Curriehill much credit for his plan. He concludes by the remark that though trade and manufactures are flourishing in France and other countries where the *commandite* principle is recognized, yet that as England is equally flourishing under the present system, that therefore we do not require any change. It would be as sensible to argue that because a man of sound and vigorous constitution, who indulged in excesses and dissipations injurious to most men, and yet enjoyed average health, as good if not better than that of a delicate man who lived regularly and carefully, that therefore the indulgence in dissipation and excess was not injurious. I mention this trite objection—which, admitting of an obvious answer, has been so often answered—for the purpose of calling attention to an additional observation of Lord Curriehill on this subject, which seems to afford as just grounds of complaint as his observation on the Irish Anonymous Partnership Act. He gives as a reason why *commandite* partnerships might work well in France, that the bankruptcy laws

are so much more strict in that country. Now, upon investigation it will be found that there does not exist such a very great difference between the bankruptcy laws of both countries. I have in my former paper on this subject called the attention of the Society to this matter, and shall not therefore venture to repeat the details there given. I think, however, that, pointing out, as I have carefully and fairly done, the material points in which the bankruptcy laws of the two countries differ, I am justified in saying (as I have before this tried to establish) that by a few clauses introduced into the Bill for the legalization of *commanditaire* partnerships, extending and modifying the penal sections of our present bankruptcy law, safeguards against fraud might be as effectually provided as by the French code.

Of the Commissioners who have given their opinions in separate statements, as already remarked, Lord Curriehill, Mr. Anderson, and Mr. Slator are opposed to the introduction of the *commandite* principle; Mr. Anderson, however, relaxes so far as to approve of the special loan system recommended by the previous Commission. Mr. Bramwell and Mr. Hodgson are in favour of the proposed change, and the two senior commissioners have not expressed any individual opinion. In looking over the statements of Mr. Slator and Mr. Anderson, I could not observe any arguments which had not been before stated, and which therefore to enter upon would be but taking up the question *de novo*. As I fear that I have almost reached the limits fixed by the Society for the length of papers, I must content myself with making a few general observations on the evidence taken by this Commission.

Beyond question, the weight of evidence is in favour of the change; and it is deserving of especial consideration that nearly all who have given evidence against the introduction of a law of limited liability, are such large capitalists that they have to a certain extent, a monopoly in extensive transactions, which would be materially affected by laws which would permit small capitals to be accumulated. Nothing can be farther from my intention than to charge these gentlemen with giving unfair or inaccurate evidence. But when self-interest is involved, it is impossible for a man to divest himself of all prejudice; insensibly and unintentionally his mind will be biassed, and he will take a partizan view of a case. There have been some moves in this matter in Parliament during the present session; and I trust that, ere long, notwithstanding the Report of the Commissioners, and the opposition of the capitalist interest, a measure which will confer so many benefits and be of such solid advantage to the middle classes will receive the sanction of the legislature.