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SECTION 38 *OF THE LARCENY ACT.*

Lately we pointed out the objections to several proposed laws, to-day we purpose to direct attention to a very dangerous law. The 38th Section of our larceny act is not entirely of Canadian manufacture. With some trifling differences of phraseology the former part is borrowed from the English act 31 and 32 Vic. c. 116, Sect. 2, which is in the following words:

"If any person, being a member of any copartnership, or being one of two or more beneficial owners of any money, goods or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property of or belonging to any such copartnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted and punished for the same as if such person had not been or was not a member of such co-partnership or one of such beneficial owners."

Our statute is in these words: "Whosoever being a member of any co-partnership owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles, *or* UNLAWFULLY *converts the same or any part thereof to his own use, or that of any person other than the owner,* shall be liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such co-partnership, or one of such beneficial owners."

The disposition in italics and capitals is the addition of our law. The object of the legislature in enacting these clauses was excellent. It was to give the protection of the criminal law to co-partners one against the other. It is perhaps to be regretted that every moral offence cannot be made the subject of some exemplary penalty. There can be no doubt that from a purely abstract point of view this is the highest administrative idea. But there seems to be a practical limit, very soon reached, beyond which it is found imprudent to go. If all immoral, *i.e.*, improper or unlawful, acts were to be subject to penal consequences, it is evident that recourse would be had to the criminal courts in every legal difficulty. The tendency in this direction is already considerable, and it is only restrained by the judicial influence, which has hitherto discouraged all these attempts. How long this reserve can be kept up, depends to a great extent on the wisdom of Parliament, and the moral courage with which members refuse to be intimidated by the fear of being mis-represented to their constituents. The 38th Section of the Larceny Act makes the line dividing crime from civil wrong-doing so undistinguishable that it belongs to a class of legislation which is highly dangerous. If any one will take the trouble to examine the relations existing between partners or beneficial owners, he will at once see how impossible it is to put a partner in the place of a thief without revolutionizing the whole doctrine of larceny. The *taking*, which is the essential act of stealing, cannot take place by the partner. Of course it will be answered, there may be a fictitious taking as when the conversion is assimilated to the taking, for example when a servant steals property under his charge. This however is no valid answer, for in such case the moral guilt is directly apparent. But in the conversion by the co-partner or part beneficial owner, the moral guilt, except in some very exceptional cases, can only be made apparent by a complete examination of the whole details of the business. The embezzlement alternative is not open to precisely the same objections, for in embezzlement there is no *wrongful taking*; but it has other objections of its own, and it is equally open to the difficulty that to ensure conviction, on even plausible grounds, the whole business of the co-partnership must be gone into.

Fortunately the text of the statute, in so far as it is borrowed from the English act, is so imperfect that no indictment can be framed under it. This difficulty is not acknowledged in England, it appears, or rather the point has not been raised. In the *Queen & Butterworth* (12 Cox, 132) it was objected that it was not a felony, but Lush, J., exclaimed, "if the offence is not a felony, what is it?" He might have been answered by one word,—"nothing." That this would have been the proper mode of looking at it was exemplified a few minutes later, by the same judge citing the 24 and 25 Vic., c. 96, s. 3, which says that a bailee fraudulently converting property "shall be guilty of larceny."