prepared to read in any such words as "purported" or "intended". In answer to the argument that such a construction would render the section nugatory, the Court said, in relation to cancellation of a license, that the section would preclude a licensee from suing for damages for breach of an alleged contract not to cancel his license. It is open to question whether such an action would in any case be maintainable in view of the principle that "if a person or public body is entrusted by the legislature with certain powers and duties expressly or implicity for public purposes, then those persons or bodies cannot divest themselves of those powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties".[17] However, the true nature and extent of that principle is probably uncertain enough[18] to justify the Full Court in ignoring it in the particular context. It was further noted by the Court that s. 20 does not purport to exclude challenges to the validity of acts of the relevant authorities in *all* circumstances: that, for example, it does not bar an allegation of invalidity by way of defence to a prosecution of an offence under the Acts. If this can be done, why should the person affected not be able to establish his rights by action without having to run the gauntlet of a criminal prosecution? The Court went on to hold that the case for the plaintiff was eminently arguable and that the interlocutory injunction sought should be granted in order to protect it from undue loss pending trial.

In this case the Court was able to achieve a just result in terms of citizens' rights without too much stretching or contraction of the language of the Act. But it would be better if the legislature could be induced to expunge such privative clauses from existing legislation and to avoid them in the future.

ROSS ANDERSON*

CRIMINAL LAW

Codified Accomplices

In *Solomon*[1] a big enough step forward was taken in the slow process of interpreting the general part of the Queensland Criminal Code to justify hailing the case as a landmark. Among other

17. *Birkdale District Electricity Supply Co. v. Corporation of Southport* [1926] A.C. 355 at 364 *per* Lord Birkenhead. See also *Ayr Harbour Trustees v. Oswald* (1883) 8 App. Cas. 623; *Buchanan v. Redcliffe Town Council* [1950] St. R. Qd. 24.
18. See J. D. B. Mitchell, *The Contracts of Public Authorities*, pp. 57-65.
1. [1959] Qd.R. 123.

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things, it affords a valuable corrective to the ever-present temptation to interpret the Australian criminal codes in such a way as to produce conformity with the common law, even at the risk of violence to the wording. No better examples of this tendency could be found than certain dicta of the High Court in *Brennan v. The King*[2] which the Queensland Court of Criminal Appeal refused to adopt in *Solomon*.

The following are the relevant parts of the relevant sections of the Code.

7. *Principal Offenders.*—When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(*a*) Every person who actually does the act or makes the omission which constitutes the offence;

(*b*) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(*c*) Every person who aids another person in committing the offence;

(*d*) Any person who counsels or procures any other person to commit the offence.

8. *Offences committed in prosecution of common purpose.*—When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

9. *Mode of execution immaterial.*—When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled, or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him.

23. *Intention.*—. . . Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not

2. (1936) 55 C.L.R. 253.

criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

291. *Killing of a human being unlawful.*—It is unlawful to kill any person unless such killing is authorized or justified or excused by law.

293. *Definition of killing.*—Except as hereinafter set forth, any person who causes the death of another directly or indirectly, by any means whatever, is deemed to have killed that other person.

302. *Definition of murder.*— . . . (2) If death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life.

The majority judgement[3] is particularly valuable for its theoretical treatment of the relationship of sections 23, 7, 8, and 9, with one another. To appreciate the point it must be remembered that s. 23 falls within Chapter V of the Code, the contents of which are applied by s. 36 to all offences under the statute law of Queensland, including, of course, the Code itself. The argument runs as follows.

Prima facie, s. 23 applies to every other section in the Code. By its own terms, however, it does not apply where it would be inconsistent with some express rule as to liability for negligence. This qualification does not imply that s. 23 cannot be excluded in any other way, for rules as to negligence are not the only ones with which it may be inconsistent. Examples of sections which must be taken also to exclude the operation of s. 23 are ss. 8 and 9, for otherwise they would be self-contradictory. This is so because it would be a contradiction to say that one is not criminally responsible for an act which occurs independently of the exercise of one's will (s. 23), but is deemed to be so responsible for certain acts whether they occur independently of the exercise of one's will or not (ss. 8 and 9).

But s. 23 is not excluded by s. 7. There are three reasons for saying this. First, it is evident that the foregoing argument does not apply to s. 7, for to combine its terms with those of s. 23 produces no contradictions. Take 7 (*c*) as an example: it is not self-contradictory to say that one is not criminally responsible for an act which occurs independently of the exercise of one's will (s. 23), but is so responsible for aiding another to commit the offence charged (s. 7 (*c*)). Since s. 23 is not excluded by necessity, s. 36 decrees that it shall be read into s. 7. The second reason is the reference throughout s. 7 to "the" offence, *i.e.*, to the offence

3. Delivered by Philp J. Mansfield C.J. agreed with him *in toto*. Mack J. delivered a separate concurring judgment, but whether he intended to differ in any way from his brethren is not clear.

actually charged. To take 7 (*c*) as an example once more, it is clear that the aiding must be of the offence charged, not of some other offence by virtue of which one is deemed to have aided in the offence actually charged. The third reason is that to exclude s. 23 from s. 7 would have the effect of making s. 7 cover the same ground as s. 8 rather more obscurely than s. 8 does. There is not the slightest reason for supposing that either s. 7. or s. 8 is superfluous, and it would be contrary to well-established principles of statutory interpretation to arrive at this result without necessity.

Apply this view of the Code to *Solomon*. S was charged with two others under s. 302 (2) with the murder of a man whom all three had attacked and robbed. There was no doubt that S had taken part in the robbery and had previously agreed with the other two to do so, but it was not proved who had struck the fatal blow, a kick on the head. All three were convicted of manslaughter. S appealed to the Court of Criminal Appeal against his conviction.

The trial judge had first directed the jury on s. 8, telling them "in effect that under that section Solomon could be found guilty of murder only and then only if the murder . . . was a probable consequence of the prosecution of the concerted unlawful purpose."[4] The court had no difficulty in holding that this was a misdirection. There had been an unlawful killing within s. 291. Section 302 (2) requires that death be caused by an act likely, on an objective test, to endanger human life. Section 8 requires that the unlawful killing be a probable consequence of the prosecution of the original unlawful purpose. The trial judge had in effect treated these two requirements as synonymous, but it is evident that an act which *might* kill (manslaughter)[5] could be a probable consequence under s. 8 without necessarily being an act *likely* to kill (murder). Therefore a verdict of manslaughter under s. 8 should have been left open to the jury.

The trial judge then turned to s. 7 (*c*), directing the jury in these terms: "Now, gentlemen, the Crown says that whoever committed the offence in this case in the sense of being the actual perpetrator, or who did the actual thing which caused the death, was aided by the other two men and I will leave that entirely to you. It must be something more, gentlemen, than a standing by, of course. It must be a voluntary assistance or aid. It must be something which actually does aid the person who actually did the unlawful *assault* and if you so find, gentlemen, then of course you will find that aider guilty. . . . You can convict two or three of them of manslaughter if you think the evidence establishes beyond

4. [1959] Qd.R. 131.
5. Manslaughter is defined in s. 303 as an unlawful killing which is not wilful murder or murder.

reasonable doubt that at least one of the persons whom you convict —you have not got to say which one—but you must be satisfied beyond reasonable doubt that at least one of the persons you convict actually did commit the *assault*—here the particular *fatal assault*—and that either one of the other two aided or assisted in the manner I have described to you and in accordance with the law as I have indicated to you in the commission of the offence."[6]

Philp J., whilst agreeing that sub-section (*c*) was the only one appropriate to the case, succinctly characterised this direction as posing the question whether S was an aider, but failing to make clear what S was supposed to have aided.[7] On the view of s. 7 which has been set out above, and which it is respectfully submitted is the right one, a clear distinction had to be drawn between aiding in the robbery and aiding in the unlawful killing. To those better versed in the common law than in the Queensland Criminal Code this may seem a strange rule in such a case as *Solomon*, but it is submitted that if the Code is approached with a mind clear of preconceptions induced by such cases as *Betts*,[8] the conclusion is seen to be inevitable unless the wording of the Code is to be strained.

It is therefore all the more regrettable that a different view was taken by the High Court in *Brennan v. The King*,[9] an appeal from Western Australia on facts similar to those in *Betts*. This very similarity may have influenced the following dictum by Dixon and Evatt JJ. (as they then were):—"Under this provision[10] the applicant was liable to conviction for manslaughter if it was established that the plan on which his confederates acted included some physical interference with the caretaker amounting to an assault, that in fact death resulted from such an assault, and that he remained on watch for the purpose of aiding them in carrying out that plan and so commit the assault, or that he counselled them to do so."[11] It is submitted with the greatest respect that their Honours could hardly have come to this conclusion[12] had they taken s. 23 into account. It is difficult to understand why neither counsel nor the High Court itself considered s. 23. One might almost suppose that no one really appreciated the significance of the fact that he was dealing with a code. It is true that later in the same judgment their Honours say of the Code (referring to s. 8) that "its language should be construed according to its natural

6. [1959] Qd.R. 132. The italics are in the original.
7. *ibid.* 131-132.
8. (1930) 22 Cr. App. R. 148.
9. (1936) 55 C.L.R. 253.
10. *i.e.*, s. 7 of the W.A. Criminal Code. All the relevant sections of this code are identical with the Queensland Code. Brennan had been on watch whilst two confederates broke into a jewellers. They killed the caretaker.
11. 55 C.L.R. 263. See also Starke J. at 260.
12. At p. 264 their Honours recognise that on their view of s. 7, s. 8 can add "little or nothing" to it.

meaning and without any presumption that it was intended to do no more than restate the existing law".[13] And yet references[14] are to be found in the arguments and judgements to principals in the second degree and abettors, neither of which terms is used in the Code; and every book and case cited is on the common law. True it is that the dictum just quoted lays emphasis on having regard to the precise words of the statute; but this approach can be misleading unless due regard be had to the part those words play *in the scheme of the code.* It is submitted that so far as s. 7 of the Queensland Criminal Code is concerned, the law is to be found in *Solomon* and not in *Brennan v. The King.*

An order was made for a new trial of Solomon for manslaughter only, he having been already acquitted of murder by the verdict in the first trial.

COLIN HOWARD*

INDUSTRIAL LAW

Trade Union: Validity of political levy: Liability for Torts

For reasons of limitation of space it is proposed to notice only two aspects of the many-sided decision of the High Court in *Williams v. Hursey*,[1] viz. (*a*) the validity of the political levy, a matter which involves some consideration of the legal status of an "organization" registered under the Conciliation and Arbitration Act (Commonwealth) and (*b*) the tort liability of the union for acts which were *ultra vires* because illegal.

The Hobart branch of the Waterside Workers Federation purported to impose a levy to aid the Australian Labour Party in a Tasmanian State election and the respondents, members of a breakaway political party, refused to pay it. The Branch and Federation claimed that as a result the respondents had ceased to be members of the union and that the Stevedoring Industry Authority should not have continued to roster them for employment on the waterfront. The Federation was registered as an "organization" under the Federal Arbitration Statute but neither it nor its Branch was otherwise registered. Burbury C.J. of the Supreme Court of Tasmania before whom the proceedings first came and from whose judgment appeal was brought to the High Court, held that it was competent for the union to provide in its rules for such a levy but that as a matter of interpretation of the union rules no such power was given by the rules.

13. 55 C.L.R. 263.
14. 55 C.L.R. 256, 259, 265, 266, 269.
1. (1959) 33 A.L.J.R. 269.

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