Kitto J. interpreted the equity to compel completion of an imperfect gift as dependent upon some conduct of the donor subsequent in time to the initial representation. 'Thus in a case of this kind what gives rise to an equity which the attempted making of the gift did not by itself create is the conduct of the intending donor after the act of incomplete gift'.[20] There was not, however, according to His Honour, any such 'subsequent conduct' after the making of the representation by Dyson. Dyson believed that he had made his wife a gift of the debt by his telling her the gift was hers. And the matter ended there, for Dyson did nothing to induce his wife to act to her detriment.

LESLIE GLICK

CARRACHER v. COLONIAL MUTUAL LIFE INSURANCE SOCIETY LTD[1]

Constitutional Law—Inter se *Questions—Insurance*

The case concerned an application by the defendant society under section 5 of the Arbitration Act 1958 to stay proceedings and refer the subject of litigation to arbitration in accordance with the agreement arrived at between the parties. The proceedings had been instituted by Mrs Jacqueline Carracher, as the assignee of a policy issued in 1960, to recover the sum assured by the defendant society on the life of her late husband, Desmond Carracher. The society by the policy agreed to pay the sum of £5000 together with bonuses upon the death of the assured. In addition, on 8 August 1962, the society agreed with the then assignees of the policy (the trustees of Carracher Brothers) in a document called 'an annexure' to pay, *inter alia*, an additional amount equal to the sum assured upon the death of the assured by accident happening after the date of the assignment. There was thereafter a further variation of the policy (important in relation to aspects of the case not fully noted here) and two further assignments whereby on 20 October 1966 the assured's wife, the present plaintiff, became entitled to the benefit of the policy. In December of the same year the assured, Desmond Carracher, died in a motor accident.

The defendant society upon the death of the assured admitted its liability under the original policy but denied liability under the annexure, relying upon one of the exclusions contained in the annexure which expressly provided that it did not extend to or cover death caused wholly or partly, directly or indirectly, whilst the assured was, because of intoxicating liquor, less capable than usual of exercising care. It appeared from the depositions of the coronial inquest that the alcohol content of the deceased's blood was very high.

The plaintiff then sued to recover the amount assured but the society sought to stay these proceedings relying upon a condition of the annexure to the effect that all differences between the parties arising out of the annexure should, if so required by the society, at any time be referred to arbitration of two persons (one to be appointed by each party to the reference) or their umpire and further that the annexure should be deemed to be a submission to arbitration within the statute or statutes regulating submissions to arbitration for the time being in force in Victoria. It was further provided that a determination in the manner aforesaid should be a condition precedent to the liability of the society under the annexure or the commencement of any proceedings against the society at law or equity.

The question, therefore, for Gillard J. was whether the defendant was en-

[20] *Ibid.* 82.

[1] [1968] V.R. 605. Supreme Court of Victoria; Gillard J.

titled by the terms of the annexure to a stay of proceedings. There was no question of the society's liability under the original life policy.

It was submitted on behalf of Mrs Carracher, however, that the effect of section 28(2) of the Instruments Act 1958[2] was to deprive the society of the right to rely upon the arbitration clause. Against this it was contended by the society that the contract of insurance (both the life policy and the annexure) was not regulated by the Victorian Instruments Act, but by the Life Insurance Act 1945-1953 (Cth); section 8(1) of which provided that the Life Insurance Act should, subject to any exceptions provided by or under the Act, apply in relation to 'life insurance business' to the exclusion of certain listed State Acts including the predecessor[3] to section 28 of the Instruments Act. Before His Honour was able to go on and decide this matter between the parties he had to consider whether there arose, in the proceedings before him, any question of the validity of section 8 of the Commonwealth enactment. Any such question would appear to be an *inter se* matter; a matter dealing with the limits *inter se* of State and Commonwealth power.[4] If such a question did arise, the jurisdiction of the Supreme Court ceased.[5] His Honour pointed out, 'as soon as the Court itself perceived that an *inter se* question

[2] This section provides '(2) The arbitration of any claim upon a contract of insurance by an insured or by any person claiming through or under an insured shall not be a condition precedent to the institution of proceedings in any court of competent jurisdiction by the insured or any such person upon such contract, and where any such proceedings are so instituted—

(a) The provisions of section five of the *Arbitration Act* 1958 shall not apply thereto; and

(b) no action shall lie against the insured or any such person as aforesaid for breach of any provision of the contract relating to the settlement of disputes by arbitration'.

[3] Instruments (Insurance Contracts) Act 1936.

[4] As to what is an '*inter se* question' see Howard, *Australian Federal Constitutional Law* (1968) 173-7; Wynes, *Legislative, Executive and Judicial Powers in Australia* (3rd ed. 1962) 669-82; Cowen, *Federal Jurisdiction in Australia* (1959) 10 s.ff. and the cases referred to by these authors. A question of the validity of s. 8 would clearly be an *inter se* matter.

[5] The Judiciary Act 1903-1966 (Cth), s. 38A provides that '[i]n matters (other than trials of indictable offences) involving any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the States; so that the Supreme Court of a State shall not have jurisdiction to entertain or determine any such matter, either as a Court of first instance or as a Court of Appeal from an inferior Court'. This section has to be read with s. 40A which provides that when an *inter se* question arises 'in any cause pending in the Supreme Court of a State', the cause is removed automatically into the High Court. Therefore, if the matter before Gillard J. had raised any *inter se* question, His Honour would at once have been deprived of jurisdiction to hear and decide the whole matter (not merely the *inter se* question). As Gillard J. pointed out it did not matter that 'no point was taken by counsel as to the validity' of s. 8 (see *Carrachers* case [1969] V.R. 605, 607), but that it was the duty of the court to ascertain whether an *inter se* question was involved (see Howard, *Australian Federal Constitutional Law* (1968) 172-3).

These two sections of the Judiciary Act (s. 38A and s. 40A) were enacted in response to the decision of the Privy Council in *Webb v. Outtrim* (1906) 4 C.L.R. 356. In that case the Privy Council had held that s. 74 of the Constitution, whereby no appeal to the Privy Council from the High Court on an *inter se* question lay without a certificate from the High Court, could be evaded by a litigant appealing on an *inter se* question directly from a State Supreme Court to the Privy Council. The object of ss 38A and 40A was to cut off such appeals to the Privy Council. The object was achieved by the indirect means of depriving the State Supreme Courts of jurisdiction in *inter se* matters and channelling all such matters through the High Court. The validity of these two sections was upheld by the High Court in *Pirrie v. McFarlane* (1925) 36 C.L.R. 170 under s. 77(2) of the Constitution.

might arise the Supreme Court loses jurisdiction to deal with the proceedings'.[6] In the result, His Honour decided that the case involved no *inter se* question, and accordingly it became necessary to consider the provisions of the Life Insurance Act (Cth) to discover how far they affected section 28 of the Instruments Act. No comment is submitted in this note upon the latter issue; upon His Honour's decision that the annexure was issued in the course of 'life insurance business' as defined by the Commonwealth Act,[7] and that the provisions of s. 8 therefore displaced section 28(2) of the Instruments Act 1958. It is sufficient to point out that His Honour ultimately granted the stay of proceedings sought by the society.

The matter with which this note is principally concerned is Gillard J.'s treatment of the *inter se* issue, a difficult matter upon which His Honour's reasons are tantalizingly brief. Having addressed to himself the question of whether an *inter se* matter was raised by the proceedings, the learned judge continued. 'On reflection I have come to the conclusion that . . . I am not concerned whether there can arise any question of the invalidity of the Commonwealth statute'.[8] The reason given for this conclusion is interesting. His Honour did not say that in his opinion the validity of section 8 of the Life Insurance Act 1945-1953 (Cth) could never be open to question, but rather that because of a provision, section 29(3),[9] of the Victorian Instruments Act 1958 it was not open to question in the particular proceedings before him. His Honour stated that 'because of the condition of the Victorian legislation, subordinating the provisions of that part of the Instruments Act to the Commonwealth Act, I am only concerned with the interpretation of the provisions of such Act and I am not concerned whether there can arise any question of the invalidity of the Commonwealth statute . . . The Victorian legislation [*sic*] has seen fit to limit the effect of its legislation and by the precise words used it has made its legislation subject to the Commonwealth Act. The Victorian Parliament literally has *adopted*[10] the qualifications or modifications on its legislation to be found in the Commonwealth statute'.[11] The reasoning of Gillard J. appears, therefore, to have proceeded as follows: if section 8 was a valid exercise of Commonwealth legislative power[12] then, of course, its provisions were binding upon him. If section 8 was not a valid exercise of Commonwealth legislative power then still its provisions were binding upon him because the Victorian Parliament had seen fit to 'adopt' the section, as it had adopted all 'the qualifications or modifications on its legislation to be found in the Commonwealth statute'. Therefore, whether section 8 was valid or invalid, its provisions (*i.e.* that section 28(3) of the Victorian Instruments Act did not apply to a transaction concerned with 'life insurance business' within the meaning of the Commonwealth Act) governed the present case. Since in either case section 8 applied, the question of its validity, the source of its binding force, did not arise.

Although the decision that no *inter se* question was involved may have suited the parties to the action, neither of whom, presumably, wished to have the case removed to the High Court with the expense and delay that such a course

[6] [1968] V.R. 605, 607.
[7] In s. 4(1) of the Life Insurance Act 1945-1953 (Cth).
[8] [1968] V.R. 605, 607.
[9] This section provides that '[t]his Division shall be read and construed subject to the Commonwealth Act known as the Life Insurance Act 1945-1953 and any amendment thereof'.
[10] Author's italics.
[11] [1968] V.R. 605, 607.
[12] Section 51 (xiv) of the Constitution provides: '[t]he Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:— (xiv) Insurance, other than state insurance, also state insurance extending beyond the limits of the State concerned'.

would involve,[13] its correctness, with respect, is open to question. It is arguable that the validity of section 8 of the Life Insurance Act 1945-1953 was in issue in the proceedings before His Honour.

Fullagar J. has pointed out '[t]here are provisions in the Life Insurance Act 1945, which may be found difficult to sustain under the Constitution at all, . . . section 8 of the Act, which purports to deprive a large number of State Acts of all effect, could conceivably be open to a challenge which would raise the whole question of what *Evatt* J. has called "manufactured inconsistency" '.[14] Section 8, of course, could not be validated by reference to section 109 of the Constitution. This section in no way confers legislative power on the Parliament of the Commonwealth but rather presupposes for its effect a valid exercise of such power. If there is a valid Commonwealth enactment inconsistent with a valid State Act section 109 asserts the superiority of the Commonwealth enactment, but it in no way increases the legislative power of the Commonwealth. Therefore, if section 8 is to be valid at all it must take its force from section 51 (xiv).

However, if section 51 (xiv) is to be the source of power for the enactment of section 8 it must be possible to characterize the section as being a law 'with respect to insurance'. Perhaps a more accurate characterization of that section would be to regard it as a law 'with respect to certain State enactments relating to life insurance'. It appears to have been enacted to ensure that certain State Acts do not impinge upon the Commonwealth's attempt to regulate life insurance. As such, in the words of Evatt J.,[15] it is an attempt to 'manufacture inconsistency' and does not relate sufficiently to the subject of insurance to be validated by section 51 (xiv). But whether this be the case or not, it is at least

[13] Perhaps such a question of constitutional validity should, though arising in private litigation, be determined at public expense.

[14] *Insurance Commissioner v. Associated Dominions Assurance Society Pty Ltd* (1953) 89 C.L.R. 78, 85. Fullagar J. made this statement by way of *obiter*. The matter before him concerned s. 59 of the Life Insurance Act 1945 (Cth), the validity of which was challenged so far as it purported to authorize the making of a winding up order. However, no general attack was made upon the validity of the Act. So far as the author can ascertain, there has been no other direct judicial consideration of s. 8. The validity of s. 94 was considered in *Commissioner for Probate Duties (Vic.) v. Mitchell* (1960) 105 C.L.R. 126, 137.

[15] In *West v. Commissioners of Taxation* (N.S.W.) (1937) 56 C.L.R. 657, 684 ff., *per* Evatt J. 'Further, as I endeavoured to illustrate in the case of *Stock Motor Ploughs Ltd v. Forsyth* ((1932) 48 C.L.R. 128) attempts by the Commonwealth Parliament to manufacture "inconsistancy" between its own legislation and that of the States will often be essayed only at the price of making the Commonwealth legislation *ultra vires*'.

In *West's* case other members of the High Court were prepared to accept a more liberal interpretation than Evatt J. of what was validated by a specific head of Commonwealth power.

However, the validity of s. 8 must surely be open to question. It can only be valid if there is contained within every grant of a specific power to the Commonwealth the power to declare inoperative certain State laws. It can hardly be that specific powers include such a power. This power to declare State laws inoperative could not be wider than that in s. 109 because s. 51 and other sections granting legislative power to the Commonwealth are expressed to be 'subject to the Constitution': subject to s. 109. But if it be no wider, there is no purpose in holding that such a power exists within specific grants.

The same considerations apply against any suggestion that s. 8 could be said to be validated by the incidental power s. 51 (xxxix). Further, it has been said that the incidental power cannot be used to affect states' rights (*e.g. Victoria v. Commonwealth* (1957) 99 C.L.R. 575, 614 *per* Dixon C.J.). S. 8 appears to do just that.

For a brief discussion of the matter of 'characterization' see Howard, *Australian Federal Constitutional Law* (1968) 4-7 and the cases and authors referred to in those pages.

open to doubt, indeed serious doubt, whether section 8 is a valid law of the Commonwealth.

Given therefore that the validity of section 8 may in some circumstances be in doubt, was there any question of its validity in the particular proceedings before Gillard J.? As mentioned above, His Honour thought not, and this for the reason that he construed section 29(3) of the Instruments Act 1958 as giving effect to the Commonwealth provisions whether they were valid or not. By way of reasons for this conclusion His Honour quoted from the judgment of Latham C.J. in *Associated Dominions Assurance Society v. Balmford.*[16] Latham C.J. said that there is 'one way and one way only to ascertain [the] intention of Parliament that, is to give careful attention to the precise words which Parliament has thought proper to use'.[17]

But, with respect, the precise words which the Victorian Parliament has used in section 29(3) of the Instruments Act 1958 seem to point away from the conclusion reached by Gillard J.

Section 29(3) appears not to have been enacted to 'adopt' the provisions of the Commonwealth statute but rather it appears to have been inserted *ex abundanti cautela*, not only to direct persons to the Commonwealth insurance legislation but also to indicate that the Victorian Parliament intended its legislation to be saved so far as possible.

This conclusion is strengthened by the context of section 29(3). The Instruments Act embodies (in section 28(2)) a clear legislative policy: to invalidate *Scott v. Avery*[18] clauses in insurance contracts. It would be odd indeed if in the very next section the Victorian legislature had notwithstanding its invalidity, adopted the Commonwealth enactment embodying the policy of allowing such clauses to operate in certain insurance contracts, namely those concerned with 'life insurance business'.

Of course the State legislatures have upon some occasions enacted statutes adopting Commonwealth provisions in the contingency that such provisions are invalid. However, this action has been undertaken only after protracted negotiations and political agreement on the subject matter of the legislation and has been evidenced by clear words in the adopting provisions.[19]

For these reasons it is submitted, with respect, that the decision of His Honour was not correct and that an *inter se* question was raised by the matter before the Court.

A. J. MYERS

[16] (1950) 81 C.L.R. 161.

[17] *Ibid.* 177.

[18] See *Scott v. Avery* (1856) 5 H.L.C. 811 and the discussion of that and associated cases in *MacGillivray on Insurance Law* (5th ed. 1961) ii, 964 ff.

[19] For the most recent example see the Petroleum (Submerged Lands) Act 1967, especially the elaborate Preamble to that statute.