Under the general doctrine of estoppel, a company which has represented, or permitted it to be represented[14], that its officer has a certain power, cannot, as against any person contracting in reliance on the representation, deny that the officer had the power. Moreover, there are many instances where a company can be said to have permitted, in the ordinary course of business, the making of such a representation. For example, a company, by its Articles, is able to delegate to a director or other officer the power to make loans. Without having such authority, an officer of the company has consistently acted as if that power had been delegated to him, by lending money on behalf of the company to various persons, and the other officers of the company, while knowing what has been done, have done nothing about the matter. In such a case it is submitted that the company is permitting it to be represented that he has that power and so is bound by the contracts he makes. The difficult question here is, at what stage can it be said that a company 'permits' the representation. It is submitted that there is something analogous to a duty on a company to exercise reasonable care to see that its officers are not consistently misrepresenting to persons dealing with it their powers, e.g., to contract on behalf of the company. If it fails to exercise such care, it permits the representation and is estopped from denying its truth to those who have relied on it in dealing with the company.

An essential of the estoppel is that the company must make or permit the representation. For example, a director of a company tells you that X, an officer of the company, has power Y, and you must deal with him. As a company can only act through its officers, it is submitted that this is a holding out by the company to you that X has that power and the company is bound by a contract which you purport to make with it through X using that power which in fact has not been delegated to him. However, before the Court will decide that there has been a holding out, it must be such that it would to a reasonable man be one sufficiently authoritative to be relied on[15].

But must the representation be that of one or more persons, each in a position of authority to make it? It is submitted that the representation on which you rely need not spring from a source which *by itself* would be conclusive as a holding out to a reasonable man. A person intending to sell heavy machinery to a company enters into its offices and asks the girl at the enquiry counter whom he should see. She asks someone in the office and says "See Y". Y, a director, purports to buy the machinery and the power to do so has not been delegated to him. In this case surely the company has held out Y as having the necessary power. On this view, in a situation where there has been a number of 'little holdings out', *each in itself* not sufficient to be conclusive, nevertheless the cumulative effect may be such that a reasonable man would assume that the necessary delegation has been made.

All things considered, it appears that, even accepting the decision in the *Rama Corporation Case*[16] at its face value, the conditions for the binding of a company which it lays down are not nearly so stringent as they may, at first sight, appear to be; moreover, the doctrine of agency by estoppel will even then remove much of the apparent force of the decision.

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STANDARD OF PROOF OF ADULTERY
WATTS v. *WATTS*[1]

The High Court, in the recent case of *Watts* v. *Watts*, again dealt with the

[14] *De Tchchatchef* v. *The Salerni Coupling Ltd.* (1932) 1 Ch. D. 330, 342.
[15] *Lancashire & Yorkshire Railway Co. & London & North-Western Railway Co. & R. Gaessner Ltd.* v. *Macnicoll* (1917) 34 T.L.R. 280.
[16] (1952) 2 Q.B. 147
[1] (1953) A.L.R. 485.

controversy as to what standard of proof applies to adultery in divorce proceedings. This problem in Australia originated in the High Court decision in *Briginshaw* v. *Briginshaw*[2], which decided that the standard applicable was the civil standard, that is, proof on the balance of probabilities having regard to the grave nature of the charge and the effect of the finding as to status. This, a well-considered decision in which all the authorities were thoroughly dealt with, settled the question for the time being.

The problem lay dormant until the Court of Appeal in *Ginesi* v. *Ginesi*[3], a decision which has been, in effect, condemned as hasty and ill-considered[4], held that because adultery is a quasi-criminal offence, the standard of proof of adultery was the standard of criminal law, namely, proof beyond reasonable doubt.

This case was the source of much controversy and caused the problem to be again considered by the High Court in *Wright* v. *Wright*[5], where the Court held that, although Australian courts should follow decisions of the Court of Appeal in England for the sake of conformity, in accordance with the views expressed in *Waghorn* v. *Waghorn*[6], they should do so only where the law of England is settled; and that it could not be said that the decision in *Ginesi* v. *Ginesi*[7], based upon an erroneous analogy, settled this particular issue in English law. Accordingly, the High Court refused to overrule its earlier decision in *Briginshaw* v. *Briginshaw*[8].

The High Court's view that the law was not definitely settled in England was borne out by the attack on *Ginesi* v. *Ginesi*[9] by other members of the Court of Appeal, especially Denning, L.J. Thus, in *Davies* v. *Davies*[10], the Court of Appeal held that there is no decision of that Court to the effect that matrimonial offences other than adultery need be proved with the same degree of proof as a crime. Denning, L.J., quoting *Mordaunt* v. *Moncreiffe*[11], pointed out that a suit for divorce is a civil and not a criminal procedure. Again, in *Gower* v. *Gower*[12], *Ginesi* v. *Ginesi*[13] was criticised and doubted by Denning, L.J., and in *Bater* v. *Bater*[14] the Court of Appeal held that the criminal standard did not apply to petitions upon the ground of cruelty.

Up to this point the duty of an Australian trial judge had seemed clear, namely, following the High Court, to apply the civil standard. This certainty was shattered by the decision of the House of Lords in *Preston-Jones* v. *Preston-Jones*[15], where the problem that arose was whether non-access by the husband for the period from 186 to 360 days before birth of a normal, full-period child to the wife, was conclusive proof of adultery. The general conclusion was that, where the bastardization of a child born in lawful wedlock was raised, the standard of proof necessary is proof beyond all reasonable doubt, but not scientific certainty. Thus, the point of controversy was not really in issue, because bastardization required from time immemorial a very strict standard of proof. But at least one of the Lords, namely Lord MacDermott, would have generalised the requirement of the higher standard. It is interesting to note that his reason for doing so was not any quasi-criminal analogy, but the public policy of preserving the sanctity of marriage. Others of the Lords present referred to the question, but none actually expressed their opinion on it.

[2] (1938) 60 C.L.R. 336.
[3] (1948) P. 179.
[4] Dixon, J., in *Wright* v. *Wright* (1948-49) 77 C.L.R. 191, 211.
[5] (1948-49) 77 C.L.R. 191.
[6] (1941-42) 65 C.L.R. 289.
[7] (1948) P. 179.
[8] (1938) 60 C.L.R. 336.
[9] (1948) P. 179.
[10] (1950) P. 125.
[11] (1870-75) L.R. 2 Sc. & Div. 374.
[12] (1950) 1 All E.R. 804.
[13] (1948) P. 179.
[14] (1951) P. 35.
[15] (1951) A.C. 391.

The problem raised by this case was whether the decision given was such that, in accordance with the direction of the High Court in *Piro* v. *W. Foster Limited*[16], the State Supreme Courts must follow it in preference to the two earlier High Court decisions, there being no differentiating local circumstances. The immediate result was dissension among the State Courts. In New South Wales, Richardson, J., in *Stone* v. *Stone*[17], held that: (1) *Preston-Jones* v. *Preston-Jones*[18] was in conflict with *Briginshaw* v. *Briginshaw*[19] and *Wright* v. *Wright*[20], and (2) that he was bound to follow the House of Lords. Also, in *Mackie* v. *Mackie and Sorrenson*[21], the Full Court of the Queensland Supreme Court held that, although the decision of the House of Lords in *Preston-Jones* v. *Preston-Jones*[22] was not express upon the point in question, all the speeches in the House were based upon the correctness of the decision in *Ginesi* v. *Ginesi*[23], and that the fact that the criminal standard applied was common to all the parties to the case and had become the accepted law in England.

On the other hand, Coppel A.J., in the Supreme Court of Victoria came to an entirely opposite conclusion in *Hobson* v. *Hobson*[24]. The learned Judge decided four points, namely:

(1) The directive in *Piro* v. *W. Foster Limited*[25] merely gives the trial Judge a discretion not to follow the technically binding decisions of the High Court where they directly conflict with decisions of the House of Lords, and does not impose a duty to do so.

(2) The discretion is to be exercised in favour of the decision of the House of Lords only where it is *directly* in conflict with that of the High Court, so that it can be assumed that upon the question being again brought before the High Court that Court would overrule its previous decision.

(3) The decision of the House of Lords in *Preston-Jones* v. *Preston-Jones*[26] did not conflict with the earlier High Court cases as the House was not dealing with the question of standard of proof in adultery *simpliciter*, because bastardization issues were also involved. And that the one express opinion and the other doubtful implied opinions in favour of the higher standard did not carry sufficient weight to command the discretion.

(4) He therefore held himself bound to follow the High Court. Even if the discretion was invoked, he did not think it likely that the High Court would overrule its prior decision.

As regards point (1) of this judgment, Coppel, A.J., based his holding upon the actual words used in *Piro* v. *W. Foster Limited*[27], for he pointed out that of the five Judges present in that case only Rich, J., and perhaps Williams, J., used words capable of imposing a duty. The present writer agrees with the learned Judge. Starke and McTiernan, JJ., used expressions definitely conferring a discretion. Starke, J., said: " . . . but this appears to me a matter which other courts and primary judges must deal with as they think most conducive to the regular administration of justice and the interest of the litigant parties . . . "[28]; and McTiernan, J., said: " . . . it should rightly be regarded as within the discretion of an Australian Court . . . "[29]. Latham, C.J., also prefaced his directive with the words " . . . a wise general rule of practice . . ."[30].

Williams, J., whose judgment was not referred to in *Hobson* v. *Hobson*[31], referred to the decision of *Robins* v. *National Trust Co. Ltd.*[32], where Lord Dunedin, when delivering the judgment of the Privy Council, said: "(The House of Lords) is the Supreme Tribunal to settle English law, and that being settled,

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[16] (1943-44) 68 C.L.R. 313.
[17] (1951) 69 W.N. (N.S.W.) 275.
[18] (1951) A.C. 391.
[19] (1938) 60 C.L.R. 336.
[20] (1948-49) 77 C.L.R. 191.
[21] (1952) Q.S.R. 25.
[22] (1951) A.C. 391.
[23] (1948) P. 179.
[24] (1953) V.L.R. 186.
[25] (1943-44) 68 C.L.R. 313.
[26] (1951) A.C. 391.
[27] (1943-44) 68 C.L.R. 313.
[28] *Id.* at 327.
[29] *Id.* at 336.
[30] *Id.* at 320.
[31] (1953) V.L.R. 186.
[32] (1927) A.C. 515.

the Colonial Court, which is bound by English law, is bound to follow it."[33] The learned Judge proceeded to point out that Lord Dunedin's view was very similar to that expressed by Isaacs, J., in *Webb* v. *The Federal Commissioner of Taxation*[34]; and that, although Lord Wright's opinion that " . . . to define and declare Colonial law is the province of the Privy Council . . . "[35] appeared technically correct, Lord Dunedin's view was eminently practical. Williams, J., went on to say: " . . . it is the invariable practice for the Australian Courts, including this Court, to follow the decision of the House of Lords as of course". He added later: "For this Court to rule that the Courts of a State should follow a decision of this Court rather than a subsequent decision in the House of Lords, would be to place these Courts in serious difficulty, because they would then have to decide whether they should follow such ruling or the statement of Lord Dunedin in the Privy Council"[36].

It would be difficult to interpret the words used by Williams, J., as conferring a discretion rather than imposing a duty, for the reason (*inter alia*) that he seems to imply that lower Courts should follow either Lord Dunedin's view or a contrary ruling by the High Court. As he was not prepared to make such a contrary ruling, Lord Dunedin's view gave the proper direction. But, even so, the judgments which seemed to confer a discretion remain in the majority; so that *Piro* v. *W. Foster Limited*[36a] remains open to be interpreted in this manner. Assuming this, was Coppel, A.J., right in holding that a discretion existed in view of Lord Dunedin's statement in *Robin's Case*[36b], which was not cited to the Court in *Hobson* v. *Hobson*[37].

In answering this it must first be observed that the statement of Lord Dunedin is merely *obiter*, insofar as there was no conflicting House of Lords decision involved in the case. It appears to have been recognised as such by Williams, J., in *Piro* v. *W. Foster Limited*[38], for he refers to it as merely Lord Dunedin's view; and so with Lord Wright in his article[39]. The need felt by the High Court formally to lay down a rule is weighty evidence that they were of the opinion that Lord Dunedin's statement was not a binding one. Even if the statement were binding it could well be regarded as of such a sweeping character that the directive in *Piro* v. *W. Foster Limited*[40] creating a discretion could be held to be a proper interpretation of its application; and it seems to have been so regarded by McTiernan, J., who cites it as authority for the creation of the discretion. On either view, the conclusion drawn by the learned trial Judge appears preferable to the contrary assumption in *Stone* v. *Stone*[41] and *Mackie* v. *Mackie and Sorrensen*[42].

Point (2) of Coppel, A.J.'s judgment suggests that the discretion conferred was for the purpose of escaping from the over-rigid technical rule that State Courts must follow the High Court. For, otherwise, the application of that rule would require the lower Court to follow the High Court even when it appeared certain that that Court would overrule its decision. The word 'directly' is important in the present case; it is derived from the words 'clear conflict', used by Latham, C.J., and McTiernan, J.[43] This definition would prevent a State Court preferring a House of Lords decision where there were doubts as to what the House of Lords actually did decide, or as to whether its decision does conflict with that of the High Court or is based upon a principle which conflicts with that upheld in the High Court. It remains the province of the High Court to resolve such doubts.

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[33] *Id.* at '19.
[34] (1921-22) 30 C.L.R. 450, 469-470.
[35] Lord Wright, "Precedents" (1943) 8 *Camb. L.J.* 118, 135.
[36] (1943-44) 68 C.L.R. at 342.
[36a] *Supra.*
[36b] (1927) A.C. 515.
[37] (1953) V.L.R. 186.
[38] (1943-44) 68 C.L.R. 313.
[39] Lord Wright. "Precedents" (1943) 8 *Camb. L.J.* at 135.
[40] (1943-44) 68 C.L.R. 313.
[41] (1951) 69 W.N. (N.S.W.) 275.
[42] (1952) Q.S.R. 25.
[43] In *Piro* v. *W. Foster Ltd.* (1943-44) 68 C.L.R. 313.

It follows that if the High Court, as it has in *Watts* v. *Watts*[44], decided that the House of Lords did not determine the question and the House in a subsequent decision holds that it did, then there would be clear conflict between the two interpreting decisions so that the discretion would have to be exercised in favour of that of the House of Lords. This, perhaps, would also occur if the House continually based decisions upon the assumption that *Preston-Jones* v. *Preston-Jones*[45] did decide the issue.

The prophecy implied in Point (4) of Coppel, A.J.'s, judgment was fulfilled shortly afterwards when the High Court was called upon to review the problem in the present case, *Watts* v. *Watts*[46]. The Court held that the standard to be applied was the civil standard qualified by the considerations put forward by Dixon, J., in *Briginshaw* v. *Briginshaw*[46a], as to the gravity of the charge and the seriousness of the finding. The issue was decided by the Court, Fullagar, Kitto and Taylor, JJ., upon the ground that *Preston-Jones* v. *Preston-Jones*[47] did not expressly decide the question. For this reason, and because the Court still regarded its previous decisions as good law, it was held that the earlier cases should stand.

Hobson v. *Hobson*[48] was not cited to the High Court, so that the view that *Piro* v. *W. Foster Limited*[49] confers a discretion was not dealt with by the Court. A connected question of precedent is whether a decision of the House of Lords must be express before the High Court will overrule a previously clear decision of its own, refusing to follow a conflicting decision of the Court of Appeal. On this, the principal case does by implication decide that mere *dicta* by one or two of the Lords is not of sufficient weight. On this view, in another field of law, the *dicta* of the House of Lords in *Winter Garden Theatre Limited* v. *Millennium Productions limited*[50] will not, it seems, cause the High Court to overrule its previous decision of *Cowell* v. *Rosehill Racecourse Co. Limited*[51], in which the Court refused to follow the Court of Appeals decision in *Hurst* v. *Picture Theatres Limited*.[52]

Though the controversy as to the standard of proof is settled for the time being, the question may now arise whether the High Court will follow the English line of decisions if the law becomes settled in England in favour of the higher standard, though without an express decision of the House of Lords. There seems to be a deep-seated objection in the High Court to establishing the criminal standard. Whether this is based upon the ground that it is an anomaly in the ordinary rules of proof, or impractical, is difficult to say; but the fact that the High Court has repeatedly adhered to the civil standard in face of growing opposition for fifteen years, suggests that it will continue to do so. It may be added, in this regard, that Canadian courts have established the civil standard. In *Smith* v. *Smith and Srielman*[53] the Supreme Court of Canada rejected *Ginesi* v. *Ginesi*[54], distinguished *Preston-Jones* v. *Preston-Jones*[55], and approved *Briginshaw* v. *Briginshaw*[56] upon a basis similar to the High Court's reasoning in *Watts* v. *Watts*[57]. In New Zealand, previously to the case of *Preston-Jones* v. *Preston-Jones*[58], the Supreme Court in *Andrews* v. *Andrews*[59], *per* Fair, J., followed *Ginesi* v. *Ginesi*[60] without more; but Fell, J., in *Price* v. *Price*[61], held that *Ginesi* v. *Ginesi*[62] was not to be followed in view of criticisms by later Court of Appeal decisions, and of the refusal of the High Court in *Wright* v. *Wright*[63].

It seems safe to assume that, short of an express decision of the House of Lords upon the standard of proof in adultery, the Australian law is settled, and

[44] (1953) A.L.R. 485.
[45] (1951) A.C. 391.
[46] (1953) A.L.R. 485.
[46a] (1938) 60 C.L.R. 336.
[47] (1951) A.C. 391.
[48] (1953) V.L.R. 186.
[49] (1943-44) 68 C.L.R. 313.
[50] (1948) A.C. 173.
[51] (1936-37) 56 C.L.R. 605.
[52] (1915) 1 K.B. 1.
[53] (1952) 3 D.L.R. 449.
[54] (1948) P. 179.
[55] (1951) A.C. 391.
[56] (1938) 60 C.L.R. 336.
[57] (1953) A.L.R. 485.
[58] (1951) A.C. 391.
[59] (1949) N.Z.L.R. 173.
[60] (1948) P. 179.
[61] (1951) N.Z.L.R. 1097.
[62] (1948) P. 179.
[63] (1948-49) 77 C.L.R. 191.

will remain divergent from the present English law upon the point.
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DEFENCE POWER—TENSION SHORT OF WAR: *MARCUS CLARK & CO. LTD.* v. *THE COMMONWEALTH*

Our modern age has thrown into confusion many of the conventional, clear-cut distinction between war and peace. In *Marcus Clark & Co. Ltd.* v. *The Commonwealth*[1] this has been illustrated in a different sphere — the scope of the defence power under the Australian Constitution[2]. This is not the first case in which the defence power has been considered in the context of an international situation that was not war nor yet profound peace[3]. It did, however, establish for the first time beyond doubt the importance for the application of the defence power of another special set of circumstances, a period of extreme international tension.

The Capital Issues regulations[4], which were the subject of challenge in this case, were a relatively mild form of economic control. Briefly, they make all borrowing by both companies and individuals, above a certain amount and otherwise than from banks, pastoral companies, building societies and co-operative societies, subject to the consent of the Treasurer. Similarly, consent has to be obtained for all loans of capital by companies above the same amount. Regulation 17 (i) states that the Treasurer's consent is not to be refused "except for purposes of or in relation to defence preparations". Further provisions of the Regulations[5] set up machinery whereby an application can be made to a court for an order directing the Treasurer to state his reasons for his refusal of consent.

In this case Marcus Clark & Co. Ltd. had applied for consent to borrow £100,000 on security and to an increase in its issued capital. This application was refused, and, after an order had been made directing the Treasurer to state the reasons for his refusal, a long statement was furnished setting out a list of the matters on which his decision had been based. The present action was for a declaration that the Defence Preparations Act 1951[6] and the Capital Issues regulations were *ultra vires* or alternatively that consent had been wrongly refused.

The nature of the defence power had been amply discussed by the High Court in the previous twelve years[7] and there was a substantial amount of agreement on the test to be applied. The general view of the Court was that the connection between the regulation proposed and the purpose of defence must be

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[1] *Marcus Clark & Co. Ltd.* v. *The Commonwealth* (1952) A.L.R. 821.

[2] The primary source of legislative power is s. 51 (vi) of the Constitution, which provides that the Commonwealth Parliament may make laws with respect to—"The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth." Note also s. 51 (xxix).

[3] A series of cases after the 2nd World War recognise a special "post-war" application of the defence power in relation to the control of exceptional war-caused conditions and the resettlement of ex-servicemen. See especially *Dawson* v. *The Commonwealth* (1946) 73 C.L.R. 157 and *The King* v. *Foster* (1949) 79 C.L.R. 43. For an analytical survey of the decisions see R. Else-Mitchell, "Transitional and Post-War Powers in the Commonwealth of Australia" (1947) 25 *Can. Bar Rev.* 854 & (1950) 28 *Can. Bar Rev.* 408.

[4] 1951 Stat. Rules No. 84. Defence Preparations (Capital Issues) Regulations.

[5] *Id.* Regs. 17 (iii), (iv), (v), (vi) & (vii).

[6] Defence Preparations Act (Cwlth.), No. 20 of 1951.

[7] Note especially: *South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373; *Victoria* v. *The Commonwealth* (1942) 66 C.L.R. 488; *Dawson* v. *The Commonwealth* (1946) 73 C.L.R. 157; *Hume* v. *Higgins* (1949) 78 C.L.R. 116; *The King* v. *Foster* (1949) 79 C.L.R. 43; *The Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1. Amongst the literature on the topic note especially: B. Sugerman & W. J. Dignam, "The Defence Power and Total War" (1943) 17 *A.L.J.* 207; G. Sawer, "The Defence Power of the Commonwealth in Time of War" (1946) 20 *A.L.J.* 295; G. Sawer, "The Transitional Defence Power of the Commonwealth" (1949) 23 *A.L.J.* 255; D. I. Menzies, "The Defence Power" in "Essays on the Australian Constitution" (edited R. Else-Mitchell, 1952); G. Sawer, "Defence Power of the Commonwealth in Time of Peace" 1953 *Res Judicatae* 214.