not adopted in the interest, or even assumed interest, of the employer, but to further the selfish and personal end of the employee, which in the case in question could be measured in pounds, shillings, and pence.

If it is necessary to revert to the term "scope of the employment" I should be prepared to say that an act peculiarly directed to the personal end of the employee, in direct disobedience to the order of the employer, is not within the scope of the employment.

LORD MACKENZIE—I agree with your Lordships. I think the question in this case arises upon the proper construction to be put upon the findings in fact by the learned arbiter. As I read those findings, if a written contract of employment had been made with the workman what it would have contained would have been this, that the appellant was employed as a machine moulder to remove loose sand from the top of the moulding box by means of a wooden scraper provided for the purpose, and by no other means. I think that is the fair construction to put upon paragraphs 4 and 5 coupled with paragraph 14. The use of the scraper was compulsory, and consequently there must be inserted into any written contract of employment a limitation to that method, and that method alone, of removing sand.

What the appellant did was deliberately to insert his hand between the moulding box and the top plate in a hydraulic press. In so doing he was doing something that he was not employed to do. It was not a case of his doing what he was employed to do but doing it in an improper manner. Accordingly, on the authorities, I think the result at which the learned arbiter arrives is inevitable. But I wish to guard myself from being supposed to hold that if the insertion of the hand had been by mere inadvertence the same result would have followed. The facts found in the case exclude the idea that his hand got in by accident or by inadvertence. It was put in deliberately.

LORD SKERRINGTON—I agree with your Lordships and upon this ground, that the claim of the appellant is barred by the authorities which have been cited to us.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Moncrieff, K.C.—Mitchell. Agent—D. MacLean, Solicitor.

Counsel for the Respondents—Macmillan, K.C.—W. T. Watson. Agent—Robert Miller, S.S.C.

Saturday, October 27.

FIRST DIVISION.

[Lord Anderson, Ordinary.

A B *v.* C B.

Expenses—Taxation—Husband and Wife—Divorce—Successful Action of Divorce by Husband against Wife with Separate Estate—Principle of Taxing Expenses.

The husband of a woman who had considerable separate estate obtained decree of divorce against her and was found entitled to expenses. *Held* (*sus.* Lord Anderson) that the husband's account of expenses fell to be taxed as between party and party, and not upon the consistorial or matrimonial scale.

A B, *pursuer*, brought an action of divorce for adultery against his wife, C B., *defender*.

On 28th March 1917 the Lord Ordinary (ANDERSON) pronounced this interlocutor—"The Lord Ordinary . . . finds facts, circumstances, and qualifications proved relevant to infer that the defender has committed adultery: Finds her guilty of adultery accordingly: Therefore divorces and separates the defender from the pursuer, his society, fellowship, and company in all time coming. . . . Finds the pursuer entitled to expenses against the defender," &c

The pursuer lodged a *note of objections* to the Auditor's report in the following terms:—". . . That under said interlocutor [of 28th March 1917] the business accounts incurred by the pursuer to (1) Messrs Warden & Grant, S.S.C., and (2) Mr C. A. M'Grady, solicitor, Dundee, amounting together to £160, 5s. 8d. were lodged with the Auditor for taxation. That the Auditor in his report proposes to tax off the sum of £87, 1s. 8d. Leaving the sum of £73, 4s. That the pursuer's agent, who attended the audit, contended that the taxation as between spouses ought to proceed upon what is known as the consistorial or matrimonial scale, and that after asking for authority for the application of that scale as between a successful husband and an unsuccessful wife, the Auditor sustained the contention of defender's agent, who appeared at the diet, to the effect that the matrimonial scale is limited in its application to cases of wives, whether guilty or innocent, obtaining decree for expenses against their husbands, and is inapplicable to husbands' accounts against wives, and he accordingly taxed the account on a strict party and party basis. That the major part if not the whole of said allowances, amounting to £87, 1s. 8d., are due to said decision on principle. That the pursuer humbly conceives that the said decision is erroneous in principle, and that no distinction can properly be drawn between the rights of a wife against a husband in such a matter, and those of a husband against a wife. He accordingly craves the Lord Ordinary to remit the account back to the Auditor with a suitable instruction or instructions that the mat-

rimonial scale is applicable, and that the account falls to be re-audited upon that principle."

On 20th July 1917 the Lord Ordinary approved of the Auditor's report and decerned in terms thereof.

Opinion.—"This question of taxation arises in connection with an action of divorce which was brought by Captain A B against his wife. The action was undefended, and after hearing evidence I pronounced decree of divorce, finding that Mrs B had committed adultery.

"Mrs B is possessed of large separate estate in her own right, and, accordingly, in conformity with well-settled practice, I found that the successful husband was entitled to expenses against the separate estate of his wife.

"The husband's solicitors lodged an account of expenses for taxation, and framed the account on what is known as the matrimonial basis of taxation—that is to say, a scale of taxation which is higher than the ordinary party and party scale, but somewhat lower than the high scale of taxation, to wit, that between agent and client.

"The Auditor refused to tax the account on this scale, and he ordered an accounting on the party and party scale to be lodged. He has taxed the account on that scale, and the pursuer has lodged a note of objections to the principle of taxation adopted by the Auditor, the contention in the note of objections being that it was the duty of the Auditor in this matrimonial cause—even where the guilty wife was to pay the costs of the successful husband—that it was the duty of the Auditor in these circumstances to apply the matrimonial scale, and that he was wrong in taxing the account on the party and party scale.

"Now this raises an entirely new point. This question has never been raised, so far as I can ascertain, either in the Inner House or in the Outer House. The point is not referred to in the most recent book on taxation, that by Mr Anderson Maclaren, or in the work 'Husband and Wife,' by Lord Fraser, which is the standard authority on consistorial matters. It therefore falls to be decided by the principle of practice.

"The practice of the Court in regard to the taxation of accounts in consistorial causes is settled to this extent—if the expenses are given against a co-defender in favour of an injured husband, it is settled that the husband is entitled to the double account if taxed on the agent and client scale. The co-defender having committed a gross injury against this husband's domestic peace, is compelled to pay the expenses of the injured husband on the highest scale of taxation.

"It is also well settled that a wife, whether she be the pursuer or defender in a consistorial action, and whether at the end of the day she be successful or unsuccessful, is entitled, if she has no separate estate, to expenses against her husband. These expenses are invariably taxed on what I have called the matrimonial scale.

"But, as I have said before, there is no authority on the point which is now before me. The principle which seems to underlie the fixing of a somewhat higher scale than ordinary taxation in the case of the account of a wife's judicial expenses is just this—that a wife is entitled to be relieved from all reasonable expenses by the husband whom she has wedded and whose duty it is to meet all reasonable costs to which she is put. That seems to me to be the only conceivable principle of what is the settled and recognised practice of fixing upon this scale.

"Now, plainly, that principle does not apply to the case I am dealing with. There is no reason in principle why the husband of a wife should receive more from the estate of his wife than he would have received if he had been successful in litigating with a third party,

"Accordingly, there being no principle supporting the note of objections, and there being no authority favouring it, I decide that a husband obtaining an award of expenses against the separate estate of his wife is entitled to no higher scale of taxation than that on the party basis. Accordingly I shall repel the note of objections, and grant decree for the taxed amount approved by the Auditor."

The pursuer reclaimed, and argued—The matrimonial scale of expenses was first recognised in *King* v. *Patrick*, 1845, 7 D. 536. It was applied in *M'Caw* v. *M'Caw*, 1907, 15 S.L.T. 392, and *Petrie* v. *Petrie*, 1911, 1 S.L.T. 410. The underlying principle was that the husband was bound to pay all the reasonable and necessary expenses of his wife. That scale was developed prior to the Married Women's Property (Scotland) Act 1881 (44 and 45 Vict. cap. 21). But now the spouses were on equal terms as regards property. In those circumstances it was only equitable that the matrimonial scale should be applied in favour of the husband as well as of the wife. Fraser, H. & W., pp. 1230 *et seq.*; *Stair* v. *Stair*, 1905, 13 S.L.T. 446; and *Milne* v. *Milne & Fowler*, 1871, 2 P. & D. 202, were referred to.

Counsel for the respondent was not called on.

LORD PRESIDENT—While this is an important question it does not appear to me to be attended with any difficulty. The Auditor seems to have had no difficulty, for he taxed the account on the party-and-party scale. When that was challenged and the principle underlying the award of expenses in consistorial actions was investigated by the Lord Ordinary, he also seems to have had no difficulty, and he decided the question in perfectly clear and unchallengeable terms—in the same terms substantially as expressed in Lord Fraser's work on Husband and Wife, (2nd ed.) vol. ii. pp. 1230 *et seq.* That principle has no application to the case with which we are dealing. In agreeing with the Lord Ordinary I only add that I think there is no reason why a husband should receive in an action against his wife a larger award of expenses than he would have obtained if he had been successful in litigating with a third party.

LORDS JOHNSTON, MACKENZIE, and SKERRINGTON concurred.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—A. M. Mackay. Agents—Warden & Grant, S.S.C.

Counsel for the Defender (Respondent)—R. C. Henderson. Agents—Tods, Murray, & Jamieson, W.S.

HIGH COURT OF JUSTICIARY.

Friday, November 9.

(Before the Lord Justice-General, Lord Johnston, and Lord Mackenzie.)

JACOVELLI *v.* ARCHIBALD.

Justiciary Cases — War — Defence of the Realm—Early Closing of Shops (Scotland) Order of 26th April 1917, as Amended by Early Closing of Shops (Scotland) (Amendment) Order of 28th June 1917—Construction—"Sweets."

The Early Closing of Shops Order of 26th April 1917, as amended by the Order of 28th June 1917, provides—Section 1 (*a*)—"Every shop shall be closed for the serving of customers not later than 8 o'clock in the evening on every day other than Saturday, and not later than 9 o'clock in the evening on Saturday, and in the case of a contravention of this provision the occupier of the shop, and any manager, agent, servant, or other person by whom the contravention has in fact been committed, shall be liable to a penalty." Section 2—"This Order shall not prevent . . . (2) the sale after the closing hour of meals or refreshments for consumption on the premises." Section 4—"For the purposes of the exemption relating to the sale of meals or refreshments, . . . (*b*) refreshments shall not be deemed to include sweets, chocolate, or other sugar confectionery or ice-cream."

Held that the sale after 8 p.m. on a Friday evening of strawberry ices, *i.e.*, a frozen mixture consisting of strawberries preserved in sugar, sweetening matter made of saccharine or sugar, sugar, and water, was an offence against the Order, inasmuch as the mixture fell within the term "sweets" in section 4 (*b*) of the Order.

Opinions reserved as to whether a strawberry ice was ice cream within the meaning of the Order.

The Early Closing of Shops (Scotland) Order of 26th April 1917, as amended by the Early Closing of Shops (Scotland) (Amendment) Order of 28th June 1917, is quoted *supra in rubric.*

Fillippo Jacovelli, *appellant*, was charged in the Sheriff Court at Stirling on a summary complaint at the instance of James Rennie Archibald, Procurator-Fiscal, *respondent.*

The *complaint* was in the following terms:—"Fillippo Jacovelli, restaurant-room keeper, 16 Murray Place, Stirling, you are charged at the instance of the complainer that on Friday, 3rd August 1917, you did fail to close for the serving of customers the shop occupied by you at 16 Murray Place, Stirling, not later than 8 o'clock in the evening of said day, and did about 8·40 p.m., by your servant Agnes Galloway, sell and supply three strawberry ices to John Perry, miner, 5 Park Lane, Stirling, contrary to Article 1 (*a*) of the Early Closing of Shops (Scotland) Order 1917, whereby in terms of No. 10B of the Defence of the Realm Regulations you are guilty of a summary offence against said Regulations, and are liable to the penalties specified in No. 58 thereof."

The Sheriff-Substitute (MOFFATT) having found the appellant guilty as libelled he appealed by Stated Case.

The Case stated—"At the trial the *facts* proved were—(1) That the appellant is the occupier of a restaurant at 16 Murray Place, Stirling. (2) That on Friday, 3rd August 1917, between the hours of 8 and 9 p.m., John Perry, miner, 5 Park Lane, Stirling, and two other men were in the said restaurant. (3) That on the order of the said John Perry there was sold and supplied to the three men by Agnes Blair or Galloway, a servant of the appellant, an edible or potable substance, served to them in three separate glasses, which they partly consumed. 4. That the ingredients of the said substance were—(*a*) Strawberries preserved in sugar, (*b*) sweetening matter from saccharine or sugar, (*c*) sugar, (*d*) water. (5) That there was no cream, milk, or any matter other than what is before specified in the said substance. (6) That the afore-mentioned ingredients were mixed and frozen in a machine called a 'freezer.' (7) That there is a well-known distinction between cream ices and water ices, the former being made up in different manners and of various ingredients, such as cream, milk, eggs, cornflour, and flavouring matter, the latter of water, sugar and fruit, or fruit flavouring.

"I *found* the appellant guilty, and imposed a penalty of five shillings, which was paid at the bar.

"The grounds of my decision were—That it was proved that the sale and supply of the three strawberry ices libelled took place at a time prohibited by the Early Closing of Shops (Scotland) Order 1917, being the Order dated 26th April 1917, as to the Early Closing of Shops, as amended by the Early Closing of Shops Scotland (Amendment) Order of the 28th June 1917, made by the Secretary for Scotland under Regulation 10B of the Defence of the Realm Regulations, if the Order applied. That the said strawberry ices were 'refreshments for consumption on the premises' within the meaning of the said Order, section 2, subsection (2). That they were not 'ice-cream,' but that they were 'sweets,' and by the operation of section 4 they are therefore to be deemed not to be refreshments.

"In my opinion a concoction of strawberries, sugar and water, reduced to a frozen state, would be refreshing, and