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Recent Cases

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CRIMINAL LAW—WITNESSES—POSSIBILITY OF COMPELLING DISCLOSURE OF IDENTITY OF SECRET INFORMANTS

State v. Edwards[1]

Defendant was convicted of unlawful possession of heroin. Ten minutes prior to defendant's arrest the arresting officer was told by an informer, who was a known drug addict and who, from past experience, was considered reliable, that the defendant was selling narcotics from his car on a particular street in Kansas City; that he would pick up a user, drive away and make a sale and return; and that the informant had just seen defendant approach a user. The arresting officer proceeded to the scene and followed defendant's automobile down a dead end street where he stopped defendant and found with him a known user. The officer placed them under arrest, made a hasty search of their persons and automobile but failed to uncover any narcotics in their possession. He then took them and defendant's automobile to the police station. There the automobile was left unguarded for a short time while defendant and his companion were taken into the station by the arresting officer. In a subsequent search of the automobile a capsule which contained heroin was found under the front seat. At a pretrial hearing on motion to suppress the use of the narcotics as evidence on the ground of an unlawful arrest, search and seizure, the arresting officer testified to the above stated facts but refused to divulge the informant's name. The court denied defendant's repeated requests that the arresting officer be required to divulge his informer's name, although the court did allow full interrogation as to the age, sex, and methods of the informant. The court stated that it would be reasonable to require disclosure in this situation, but took the position that in view of the holding in *State v. Bailey*,[2] that an arresting officer had the unqualified right to withhold the identity of his informant, the court had no discretion to require the divulgence of the informant's name. On appeal, *held*, reversed and remanded. Chief Justice Hollingsworth asserted:

> [T]he question of whether disclosure of the identity of a non-participating informant is essential to assure the fair determination of the issue in any given criminal case is for the trial court in the first instance. In the instant case, the trial court was prevented from a free exercise of that discretion by the ruling in State v. Bailey, supra. The conclusion here reached that the

1. 317 S.W.2d 441 (Mo. 1958) (en banc). This case overruled State v. Bailey, 320 Mo. 271, 8 S.W.2d 57 (1928).
2. 320 Mo. 271, 8 S.W.2d 57 (1928).

question is for the trial court in the first instance, of necessity, limits this court to review of such a ruling. Consequently, the judgment must be reversed and the cause remanded, to the end that the trial court, upon another trial, may, in the exercise of its discretion, determine whether the defendant can have a fair trial without requiring the officer to disclose the name of his informant.[3]

The court first dealt with the question of whether the arrest, and the subsequent search and seizure were proper under the circumstances of this case. The search here referred to is not the initial search when the arrest was made, but the search which took place by the officer after arriving at the police station. The court held that the arrest was lawful, stating as the general rule that peace officers have the power to make an arrest without a warrant when a felony has been committed and when the officer has reasonable cause to believe the person arrested committed the felony;[4] that a search and seizure made incident to a lawful arrest is not unlawful; and that any otherwise competent evidence found in such a search is admissible.[5]

The court then examined the refusal of the trial court to require the officer to divulge the name of his informant, and found that the refusal to consider the question of divulgence constituted reversible error. If divulgence of the informer's name had been required, reasoned the court, defendant might have been able to obtain evidence to convince the trial court that the officer did not have reasonable grounds to suspect at the time of the arrest that defendant was guilty of a felony, and that the arrest was unlawful without a warrant. The ensuing search and seizure, therefore not being made incident to lawful arrest, would violate defendant's constitutional rights.[6]

Additional reasons for overriding the traditional privilege against requiring disclosure of an informant's name cited by the court were: to avoid false testimony, or to secure useful evidence in preparing a defense;[7] to ascertain the identity of the informer or the exact contents of his communication where relevant or helpful to the defense, or essential to a fair determination;[8] to show the innocence of the accused;[9] and to allow the trial court to satisfy itself of the good faith of the testimony of the arresting officer.[10]

The court did not base its reversal on any one of these circumstances; rather, they are reasons why the court is of the opinion that the holding in the *Bailey* case must be overruled. In the *Bailey* case, the defendant was arrested while peace-

3. 317 S.W.2d at 447.
4. See State v. Johnson, 362 Mo. 833, 245 S.W.2d 43 (1951) (en banc); State v. Howard, 324 Mo. 145, 23 S.W.2d 11 (1929); State v. Bailey, *supra* note 1; Lang, *Criminal Law, The Work of the Missouri Supreme Court for the Year 1948*, 14 Mo. L. REV. 338, 339 (1949).
5. See State v. Raines, 339 Mo. 884, 98 S.W.2d 580 (1936).
6. 317 S.W.2d at 445.
7. 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940).
8. 317 S.W.2d at 446.
9. *Id.* at 447.
10. *Ibid.*

ably driving down the highway with his family. The arresting officer had received a tip from an informer that defendant was transporting moonshine whiskey and was given a description of defendant's automobile. The defendant was stopped and arrested, and an *immediate* search of his automobile revealed several jars, jugs and bottles of moonshine whiskey. Defendant contended that the sheriff could not be the sole judge of the accuracy and reliability of the information which formed the basis for the alleged reasonable suspicion that defendant was transporting moonshine liquor, and that the sheriff should be forced to disclose the identity of the informant so that the court could pass upon the reliability of the information. In rejecting this contention, the court said:

> It would be against public policy to compel a sheriff or other officer to disclose the identity of the person or persons who inform him of facts tending to show that a given person is guilty of felony. If information of this character cannot be given to an officer freely and without fear on the part of the informant that his part in the arrest and prosecution of one suspected of felony will be made public, the detection and prosecution of crime will be intolerably hampered and be defeated altogether in many instances.[11]

The court in the instant case found no authority for the above quoted statement,[12] and in freeing the trial court of this oppressive restriction said:

> Each case is ruled in the light of its facts. Obviously, it would simplify matters if the question of divulgence or non-divulgence of the identity of any informant could be finally ruled one way or the other so as to apply to all cases, as was attempted in State v. Bailey. . . . It is clear, however, that if due regard be given to the demands of justice to the public on the one hand and the constitutional rights of the defendant on the other, each case must be considered on its merits.[13]

The decision in this case indicates that the trial court may now exercise its discretion in requiring disclosure not only to determine whether the arrest, search and seizure were proper, but also where such disclosure may have a direct bearing on the ability to prepare a defense to a particular crime. This situation may be limited to the "possession" type crime. Whether a trial court could abuse the discretion, if it considers the issue of disclosure, appears doubtful, but the issue must at least be examined by the trial court. The result of the *Edwards* case would seem desirable in that the issue of disclosure will be decided within the balance of public policy and the defendant's rights, instead of being foreclosed absolutely to the trial court.

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11. 320 Mo. at 277, 8 S.W.2d at 59.
12. 317 S.W.2d at 446.
13. 317 S.W.2d at 447.

FEDERAL TAXATION—DEDUCTION OF HEALTH AND ACCIDENT INSURANCE PREMIUMS AS MEDICAL EXPENSES

Heard v. Commissioner[1]

The taxpayer in 1953 paid premiums on health and accident policies providing indemnity for loss of earnings and accidental loss of life, limb and sight, and reimbursement for hospital and medical expenses. The Commissioner disallowed a deduction for all of the premiums paid under such policies. The issue was: Could all the premiums paid for health and accident policies be deducted by the taxpayer under section 23(x) of the 1939 Code (Section 213 of the 1954 Code), when part of the protection provided reimbursement for loss of earnings, loss of life or permanent disabilities, or could only that portion of the premiums allocable to medical and hospital protection be deducted. The Tax Court[2] held that only that portion of the premiums which represented reimbursement for medical and hospital expenses could be deducted as medical expense. The court of appeals for the third circuit allowed all of the premiums for the policies to be deducted as medical expense.

Section 23(x) of the 1939 Code provided, as does section 213(a) of the 1954 Code, that the taxpayer may deduct expenses for "medical care" for himself, his spouse or his dependents to the extent "not compensated for by insurance." The section provided further, as does section 213 of the 1954 Code, that "the term 'medical care' means amounts paid . . . for the diagnosis, cure, mitigation, treatment, or prevention of disease . . . (*including amounts paid for accident or health insurance*). . . ."[3] (Emphasis added.)

In the principal case the court in construing section 23(x) of the 1939 Code said it would follow the "normal meaning" of the phrase, "including amounts paid for accident or health insurance," and allowed as a deduction from gross income all premiums paid for health and accident insurance. The court relied in part on a report of the Senate Finance Committee[4] which states: "Although a deduction is denied with respect to such expenses as are compensated for by insurance or otherwise, amounts paid for accident or health insurance are included in the category of medical expenses." The court also relied in part on the case of *E. M. Taylor*.[5] However, in *Taylor* there was no discussion of the exact coverage involved. The court in the principal case also pointed out that the allowance of a deduction for *all* premiums paid for accident and health insurance was no legislative oversight, since sections 104 and 105 of the 1954 Code specifically state the portion of health and accident coverage to be excluded from gross income, but in section 213 there is no such break down.

The Internal Revenue Service has announced that it will not follow the third

1. 269 F.2d 911 (3d Cir. 1959).
2. 30 T.C. 1093 (1958).
3. INT. REV. CODE OF 1954, § 213(e).
4. S. REP. No. 1631, 77th Cong. 2d Sess. 95 (1942).
5. 11 CCH Tax Ct. Mem. 652, 655 (1952).

circuit's decision in the principal case as to that portion of the premium which covers loss of life, limb, sight and time.[6] The Internal Revenue Service maintains that only that portion of the premium attributable to actual medical expenses is properly deductible.

In *Robert O. Deming, Jr.*,[7] apparently the only case before *Heard* where a similar issue was raised, the taxpayer received in the taxable year total payments of $7,011.66 under accident insurance policies, $6,160.00 of the payments having been designated as indemnity for disability, and $851.66 having been designated as indemnity for hospitalization and medical expenses. The taxpayer's actual medical expenses totaled $2,117.90. The Tax Court held that the taxpayer's actual medical expenses were "compensated for by insurance" within the meaning of section 23(x) only to the extent that he received insurance payments specifically designated as indemnity for the hospitalization, *i.e.*, only to the extent of the $851.66. This case gives the government some basis for its position. If disability benefits need not be substracted from medical expenses, the portion of the taxpayer's premiums allocable to such benefits should not be deducted as medical expenses.

The position of the Treasury Department has been consistent. Revenue Ruling 19[8] interpreting the 1939 Code as to deductions for accident and health insurance, after citing the *Robert O. Deming, Jr.* case, states that premiums paid for accident and health insurance which do not provide reimbursement to the insured for medical expenses are not a proper deduction. To the same effect are Revenue Ruling 55-331 and Revenue Ruling 55-261,[9] both of which interpret the 1939 Code provision. The treasury regulations state that premiums paid for a policy providing reimbursement for loss of earnings due to accident or illness do not constitute amounts expended for medical care.[10] The regulations were first adopted in 1956, and followed the position taken in the prior rulings. The position of the Internal Revenue Service is further emphasized by one of its publications to guide the taxpayer.[11]

What is now section 213(e)1(A) was first enacted in 1942 and has been reenacted without change. Contrary to the suggestion in *Heard* there would appear to be nothing in the legislative history to assist in the construction of "amounts paid for accident or health insurance." Moreover, the argument of the court in *Heard* based on the wording of sections 104 and 105 is inconclusive in view of the

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6. T.I.R. 185, Rev. Rul. 59-393, 1959-60 INT. REV. BULL. 52.
7. 9 T.C. 383 (1947).
8. 1953-1 CUM. BULL. 59.
9. 1955-1 CUM. BULL. 309.
10. Treas. Reg. § 1.213-1(e)1(i) (1957).
11. I.R.S. PUBLICATION No. 17, YOUR FEDERAL INCOME TAX 118 (1960): you may not claim premiums paid on policies providing for reimbursement for loss of earnings. If a policy provides for both types of reimbursement, an allocation of the premiums must be made and only that portion attributable to the coverage for medical expenses by the insurance company is a medical expense. Premiums paid on life insurance policies are not deductible.

entirely different theory of construction applied to statutes authorizing deductions as compared with statutes defining gross income.

The rule of *ejusdem generis* would seem to support the Internal Revenue Service's interpretation. This rule of statutory construction applies to general terms following specific terms, limiting the general terms to objects similar in nature as those objects enumerated in the preceding specific terms.[12] It would seem that the rule would apply to the words "accident or health insurance," and thus limit the deductible premiums to only that portion which provides coverage for "diagnosis, cure, mitigation, treatment or prevention of disease . . . ."

In 1953 the Internal Revenue Service following *Deming* adopted the view that premiums paid for accident and health insurance which do not provide reimbursement to the insured for medical expenses are not deductible.[13] It can be argued that Congress adopted the same position when it enacted the 1954 Code.

The decision in the principal case overlooks the fact that the reported decision of the *E.M. Taylor* case gives no indication as to the kind of coverage involved. Because of this fact the *E. M. Taylor* case does not seem to be strong precedent for the result reached in the present case. The court in the *Heard* case, without attempting to define accident and health insurance, apparently held that the ostensible label determines whether or not the premium can be deducted under 23(x) of the 1939 Code (section 213 of the 1954 Code). It appears that the court overlooked the fact that the purpose of section 23(x) of the 1939 Code was to allow a deduction for actual medical expenses of a taxpayer, his spouse and his dependents and for insurance coverages which will reimburse the taxpayer for such expenses.

The position of the Internal Revenue Service is in direct conflict with the decision in the principal case. From the foregoing it would appear that Congress only intended to allow as a medical deduction those premiums which provide medical and hospitalization coverage. Premiums paid for life insurance or coverages for disability or loss of earnings have no relationship to the term "medical care" as used in section 213 of the 1954 Code. The ostensible label on an insurance policy should not be the determining factor as to whether or not the premium can be deducted as a medical expense. The Tax Court will, on the basis of the authorities, probably continue to rule as it did in *Heard* in accordance with the position of the Internal Revenue Service. If the question comes before some other appellate court it is likely that a result contrary to that in the principal case will be reached.

BYRON KENT SNAPP

12. 2 SOUTHERLAND, STATUTORY CONSTRUCTION 395 (3d ed. 1943); MERTENS, FEDERAL INCOME TAXATION § 3.16 (1956).

13. See note 9 *supra* and accompanying text.

IMPLIED WARRANTY ON FOOD AND DRINK IN MISSOURI

Midwest Game Co. v. MFA Milling Co.
Ozark Trout Farm v. MFA Milling Co.[1]

The actions were against MFA Milling Company for damage to trout, which were raised for commercial purposes, caused by defendant's fish food which was fed to the trout. It is not stated in the opinion whether the fish food was purchased from the retailer or directly from the defendant, but the decision is based on the assumption that the fish food was not purchased directly from the manufacturer. The first count of the plaintiffs' petitions claimed relief on two theories: (1) defendant's breach of implied warranty of fitness for the purpose for which the food was sold; and (2) negligence of the defendant in failing to warn plaintiffs that the food was not fit for the purpose for which sold. The trial court dismissed the petitions for failure to state claims upon which relief could be granted. On appeal, *held,* reversed. The Supreme Court of Missouri held that a purchaser of packaged goods may recover from the manufacturer upon an implied warranty of fitness even though there was no privity of contract between the buyer and the manufacturer. The court also held that the plaintiffs had stated a cause of action for negligence.

For many years, whenever a remote vendee attempted to recover against the manufacturer of the product that had caused him damage, he was confronted with the defense that there could be no recovery unless there was privity of contract. Gradually, the courts began to allow recovery by a remote vendee against the manufacturer on the grounds of negligence, but this still left much to be desired because of the difficulties of proof, even with the aid of *res ipsa loquitur.* With liability of the manufacturer established on the basis of negligence, although there was no privity, attempts were made to find liability on the ground of an implied warranty of fitness, which would, in effect, make the manufacturer a guarantor of his product.

There began a gradual breakdown in the requirement of privity for recovery on the theory of an implied warranty, but the privity requirement had been in existence so long that it was difficult to overcome. Thus many of the courts chose to use fictitious theories in an attempt either to meet or rationalize away this common law requirement. One theory used by the courts was that the advertising of the manufacturer and the placing of the goods on the market amounted to an offer which was accepted by a sub-vendee in making the purchase.[2] Other courts found a warranty running with the product in much the same way as a convenant runs with the land.[3] Some authorities found a third party beneficiary contract.[4] Still

1. 320 S.W.2d 547 (Mo. 1959).
2. 9 CORNELL L. Q. 487 (1924); 16 CORNELL L. Q. 610 (1931).
3. Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1932); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).
4. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

another theory used was that social justice demanded that the manufacturer be held responsible.[5]

One of the first Missouri cases to re-examine the requirement of privity was *Madouros v. Kansas City Coca-Cola Co.*[6] decided by the Kansas City Court of Appeals. The action was for injuries alleged to have been caused by swallowing a portion of the contents of a bottle which contained a decomposed mouse. The drink had been purchased from a retailer. The court held that privity of contract with the bottler was not necessary in order to recover on the ground of implied warranty. The court seemed to follow the more direct route and held that public policy was the basis of recovery. This in effect held the manufacturer liable as an insurer of his product. In discussing this problem the court said: "Here is a case where, if any one should be held liable, it is *clearly* the manufacturer; the injured customer cannot be regarded as *in any sense* to blame. Unquestionably, the former did, if not actually warrant the goods, *impliedly* warrant them and represented them to the *ultimate consumer,* in this case, the plaintiff. Whom else would the representation be expected to reach or influence? Under the conditions which now surround and apply to business of this nature, it does not seem to the author that this case should be decided according to the strict, technical principles heretofore deemed necessary and which arose under entirely different conditions and circumstances."[7]

In the case of *Williams v. Coca-Cola Bottling Co.*,[8] the St. Louis Court of Appeals applied the same reasoning. Thus the Missouri courts of appeals eliminated the requirement of privity of contract when allowing recovery on the ground of an implied warranty of fitness against the maker or bottler. In the period between the *Madouros* and *Williams* cases there were other cases which reached the same result.[9]

Although the courts did not hesitate to hold the manufacturer liable to the ultimate consumer of the food and drink, they did hesitate when a consumer brought an action against a wholesaler on the grounds of implied warranty. This problem arose in *De Gouveia v. H. D. Lee Mercantile Co.*,[10] only a few months after the *Madouros* case, but the court denied recovery since there was no privity of contract between the wholesaler and the ultimate consumer. The court felt that

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5. Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Hertzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924); Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915); Nock v. Coca-Cola Bottling Works, 102 Pa. Super. 515, 156 Atl. 537 (1931); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

6. 230 Mo. App. 275, 90 S.W.2d 445 (K.C. Ct. App. 1936).

7. 230 Mo. App. at 282, 90 S.W.2d at 449.

8. 285 S.W.2d 53 (St. L. Ct. App. 1955).

9. Foley v. Coca-Cola Bottling Co., 215 S.W.2d 314 (St. L. Ct. App. 1948); Holyfield v. Joplin City Coca-Cola Bottling Co., 170 S.W.2d 451 (K.C. Ct. App. 1943); Helms v. General Baking Co., 164 S.W.2d 150 (St. L. Ct. App. 1942); Carter v. St. Louis Dairy Co., 139 S.W.2d 1025 (St. L. Ct. App. 1940); Hutchison v. Moerschel Prods. Co., 234 Mo. App. 518, 133 S.W.2d 701 (K.C. Ct. App. 1939); Nemela v. Coca-Cola Bottling Co., 104 S.W.2d 773 (St. L. Ct. App. 1937).

10. 231 Mo. App. 447, 100 S.W.2d 336 (K.C. Ct. App. 1936).

the wholesaler should not be subjected to strict liability since the goods only passed through its hands in sealed containers and there was no opportunity for inspection. Therefore the wholesaler stood in a different situation from the manufacturer and social justice did not demand strict liability in that case.

In *Worley v. Procter & Gamble Mfg. Co.*,[11] there was some indication that recovery on the ground of implied warranty of fitness might be extended beyond the food and drink cases. In this case the plaintiff claimed to have suffered injuries to her skin through the use of the manufacturer's washing product. The court held that the plaintiff's case did not fail for failure to allege and prove privity, but recovery was denied for failure to prove that the product contained any deleterious substance that was in any way injurious to the skin of normal persons.

In *State ex rel. Jones Store Co. v. Shain*,[12] the Missouri Supreme Court held that an action against the retailer for breach of implied warranty can only be maintained in Missouri where the seller, pursuant to a contract, undertakes to furnish an article for a particular purpose and the buyer is shown to have relied on the seller's judgment. This case was used as authority in *Ross v. Philip Morris Co.*[13] for the general proposition that in an action by the consumer against a manufacturer, privity is required in Missouri to recover for breach of implied warranty. However this federal district court decision was rendered before the principal case. Also the *Shain* case can be distinguished from the cases previously discussed; the *Shain* case was not concerned with food and drink, but with an article of clothing which was claimed to have caused injury to the plaintiff's skin due to a defective dye. It should be noted that the *Shain* case was not even cited in reaching the decision in the principal case on the privity of contract problem in an action based on implied warranty. Thus it would seem that the Missouri Supreme Court did not consider the *Shain* case as ruling authority where food and drink were involved. This has been the position taken by the Missouri courts of appeals in those cases permitting a recovery on grounds of implied warranty subsequent to the decision in the *Shain* case.[14] In the *Worley* case a possible extension was recognized beyond the food and drink cases.

Whatever doubt was created by the *Shain* case seems to have been cleared up by the Missouri Supreme Court in the principal case. The court did not go into the reasons for not requiring privity, but the holding seemed to adopt the reasoning used by the Missouri courts of appeals for many years in reaching the same

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11. 241 Mo. App. 1114, 253 S.W.2d 532 (St. L. Ct. App. 1952).
12. 352 Mo. 630, 179 S.W.2d 19 (1944) (en banc).
13. 164 F. Supp. 683 (W.D. Mo. 1958).
14. Williams v. Coca-Cola Bottling Co., 285 S.W.2d 53 (St. L. Ct. App. 1955); Atkinson v. Coca-Cola Bottling Co., 275 S.W.2d 41 (Spr. Ct. App. 1955); Leatherman v. Coca-Cola Bottling Co., 254 S.W.2d 436 (Spr. Ct. App. 1953); Strawn v. Coca-Cola Bottling Co., 234 S.W.2d 223 (K.C. Ct. App. 1950); Duley v. Coca-Cola Bottling Co., 232 S.W.2d 801 (St. L. Ct. App. 1950); Foley v. Coca-Cola Bottling Co., *supra* note 9; Norman v. Jefferson City Coca-Cola Bottling Co., 211 S.W.2d 552 (St. L. Ct. App. 1948).

result, namely, public policy. Although the instant case was not concerned with food for *human* consumption, one may predict that the Missouri Supreme Court will hold that privity between the consumer and the manufacturer will not be required when a case concerned with injury from packaged food for human consumption comes before that court.[15]

JAMES E. SPAIN

WORKMEN'S COMPENSATION—DETERMINATION OF "MAJOR EMPLOYER" STATUS IN MISSOURI

Blew v. Conner[1]

Plaintiff was employed by the defendant to do carpentry work in the construction of a barn. While in the course of his employment plaintiff sustained permanent injuries. In an action to recover for the injuries, defendant contended that he was not a "major employer" within the meaning of the Missouri Workmen's Compensation Act[2] and hence was exempt from compulsory coverage. Defendant had, in addition to five employees engaged in the construction of the barn in Missouri, five other employees in an Illinois tavern and was a partner in an Illinois electrical shop which employed another four or five employees. The lower court held that he was a "major employer." On appeal, *held,* affirmed. Defendant's out of state employees, both of the tavern and the electrical shop, were properly counted in determining if defendant had the required ten or more regular employees and hence was within the compulsory coverage of the Act as a "major employer."

The Missouri Act, like those of most other states, does not cover every employment relation. Only a "major employer" is made subject to compulsory coverage. A "minor employer" is exempted from coverage unless he is engaged in a hazardous occupation or files written notice of voluntary acceptance of the provisions.[3]

The Missouri Act defines a "major employer" as "an employer who has more than ten employees regularly employed," and a "minor employer" as "an employer who has ten or less employees regularly employed."[4] The reason generally given for

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15. For a discussion of the scope of implied warranty in the law of sales, see Anderson, *Observations on the Law of Implied Warranty of Quality in Missouri,* 1960 WASH. U.L.Q. 71.

1. 328 S.W.2d 626 (Mo. 1959) (en banc). (Eager, J., dissented, Hyde, J. concurred in the dissenting opinion).

2. §§ 287.010-.800, RSMo 1949.

3. § 287.090, RSMo 1949.

4. § 287.050, RSMo 1949. While the Missouri Act sets the dividing point between compulsory and voluntary coverage at "over ten regular employees" the dividing point in other states ranges from a minimum of two (Oklahoma and Nevada) to a maximum of fifteen (South Carolina). The largest percentage of states set the differentiation at three or four employees. 1 LARSON, WORKMEN'S COMPENSATION § 52.10 (1952). Although Missouri appears to provide narrower

the restricted coverage is that it is a matter of avoiding administrative inconvenience to very small businesses which may lack the means to pass the cost of the coverage on to the consumer in the form of increased prices for goods and services.[5]

Although the numerical standard may, at first glance, appear to make it perfectly clear just who is a "major" or "minor" employer, the principal case illustrates that in practice the determination may develop into a crucial issue with the burden of bringing the employer within the Act resting upon the claimant who is relying on it for recovery.[6] The solution to the problem entails a determination of which employees should be counted to arrive at the "more than ten employees regularly employed" as required by the Act.

Many states provide that the employees to be counted for this purpose will be limited to those working in the same business as the injured claimant.[7] However, the Missouri Act has been interpreted differently, and it has been held that since it does not specify that all counted employees are to be in a single business, the only requirements are that all of the employees work for the same employer and that none of those counted are in an exempted occupation.[8] The result can be justified on the basis that if an employer is in business on a large enough scale to hire over ten employees, he should be expected to undertake the administrative and insurance burdens whether the employees are all in one business or not.[9]

Another problem which arose early in the history of the Act was the status of the general contractor with subcontractors working under his supervision. Under section 287.050,[10] alone, it would seem that the Act could easily be evaded by anyone carrying on a business through the use of several subcontractors, all employing less than eleven employees. This possibility has been eliminated by holding that where an employer's usual business is being carried on through contractors, the employees of the contractors should be counted as belonging to the ultimate em-

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coverage by this standard, it must be remembered that an employer of ten or less employees who is engaged in a hazardous occupation will be subject to compulsory coverage. § 287.070, .090, RSMo 1949.

5. 1 LARSON, *op. cit. supra* note 4, § 52.33.

6. Smith v. Grace, 237 Mo. App. 91, 159 S.W.2d 383 (St. L. Ct. App. 1942).

7. Over half of the states imposing a numerical minimum apply the calculation only to employees in the same business or establishment. 1 LARSON, *op. cit. supra* note 4, § 52.33. See, *e.g.*, ALA. CODE tit. 26, § 263 (Supp. 1953): ". . . shall not be construed or held to apply . . . to any employer, who regularly employs less than eight employees *in any one business*. . . ." (Emphasis added.)

8. Harmon v. Rainey, 306 S.W.2d 469 (Mo. 1957). Certain types of occupations are specifically exempted from compulsory coverage by § 287.090, RSMo 1949. These include employment by certain municipal bodies, farm labor, domestic servants, casual employment not incidental to the usual business of the employer and work done in the home of the employee. But employees in hazardous occupations are covered even though they work for a minor employer. Section 287.090(2), RSMo 1949 provides that these exempted employers may bring themselves within the provisions of the Act by voluntarily filing a written acceptance of the provisions.

9. 1 LARSON, *op. cit. supra* note 4, § 52.33.

10. RSMo 1949. See note 4 and accompanying text.

ployer and hence he will be brought within the Act as secondarily liable if the subcontractor is not providing coverage.[11]

One issue in the principal case was whether out-of-state employees might be counted to bring an employer under the classification of "major employer." The court very early had held that since the Act contained no requirement that employees, to be counted, must work within the state, for the court to imply such a condition would be to read into the Act words which were not there. In that case the court pointed out that the Act was to be liberally construed, and held that out-of-state employees should be counted.[12]

The other issue in the principal case was whether employees of a partnership in which the defendant was a partner could be counted as his employees and added to the number of those employed in his individual business. The majority held that the employees of a partnership may also be considered as employees of each partner individually, but the dissent reached the opposite result on the theory that a partnership is considered a separate entity, at least for the purpose of application of workmen's compensation acts. Here the court adopted a more liberal view than that followed in other states where the question has arisen and the reasoning of the dissent was followed.[13] The view in other states is supported by interpretation of applicable statutes which are similar to that of Missouri.[14]

The argument used by the Wisconsin court in *Kalson v. Industrial Comm'n*[15] is that since the statute defines an employer as "every person, firm, or private corporation," there would have been no reason to include the word "firm" in the definition if an employee of a partnership were to be included as an employee of each partner.

On the other hand, the majority in the principal case justified its result on statutory interpretation of the definition of an "employee." Since an employee is defined as "every person in the service of any employer . . . under any contract of hire,"[16] the argument is that "any contract of hire" should include any contract

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11. Pruitt v. Harker, 328 Mo. 1200, 43 S.W.2d 769 (1931). In *Smith v. Grace*, *supra* note 6, the court held that it was not necessary for all of the subcontractor's employees to be at work on the same premises where the accident occurred in order to be counted. They may be working on other premises where the principal contractor is engaged in other work.

12. Elsas v. Montgomery Elevator Co., 330 Mo. 596, 50 S.W.2d 130 (1932). An out of state employer doing business in Missouri has been held to be a "major employer" although he had less than ten employees in Missouri in McFall v. Barton-Mansfield Co., 333 Mo. 110, 61 S.W.2d 911 (1933).

13. Toenberg v. Harvey, 235 Minn. 61, 49 N.W.2d 578 (1951); Felice v. Felice, 34 N.J. Super. 388, 112 A.2d 581 (App. Div. 1955); Kalson v. Industrial Comm'n, 248 Wis. 393, 21 N.W.2d 644 (1946).

14. Section 287.030(1), RSMo 1949 defines an employer as "Every person, partnership, association, corporation . . . using the service of another for pay." MINN. STAT. ANN. § 176.01(5) (1945) provides: "'Employer' . . . includes any person, corporation, copartnership, or association, or group thereof . . . ." WIS. STAT. ANN. § 102.04(2) (1957) defines an employer as: "Every person, firm, or private corporation . . . ."

15. 248 Wis. 393, 21 N.W.2d 644 (1946).

16. § 287.020, RSMo 1949.

in which the defendant employer is interested and not merely one in which he is personally the sole employer.[17] The court also stressed its duty to construe the Act liberally and hence held that the employees of a partnership should be counted to arrive at the magic number of "more than ten employees regularly employed."[18]

The partnership issue was the main one in the principal case; on this issue the court split. The case authority relied on by the majority on this point does not appear to be exceptionally strong for the result reached.[19] But the reason behind exemptions of minor employers, *i.e.*, to exempt them from administrative inconveniences because of their small operations,[20] would seem to be upheld by this solution. A partner who also has another business should be considered to be in business on a large enough scale, when he hires the aggregate number of employees, to take on the administrative and insurance burdens, whether all of the employees are in one business or not. The result reached is also strongly supported by the aim of the Workmen's Compensation Act, set out in the Act itself, which provides that all of the provisions shall be liberally construed with a view to the public welfare and that a substantial compliance with the provisions should be adjudged to be sufficient.[21] It would seem that this decision is a step in the direction of a liberal interpretation which is certainly a socially desirable result.

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17. 328 S.W.2d at 629.

18. *Ibid.*

19. In Brollier v. Van Alstine, 236 Mo. App. 1233, 163 S.W.2d 109 (K.C. Ct. App. 1942), which was the only case used by the majority on this point, a partnership had voluntarily accepted the provisions of the Act. Later, one of the partners left the business. It was held that the acceptance was still binding on the partner who continued the business as an individual proprietorship.

20. 1 LARSON, *op. cit. supra* note 4, § 52.33.

21. § 287.800, RSMo 1949. This section was interpreted in Hilse v. Cameron, Joyce Const. Co., 194 S.W.2d 760, 765 (St. L. Ct. App. 1946) to require that "the Act should be construed with a liberality calculated to effect its purpose and so as to extend its benefits to the largest possible class and restrict those excluded to the smallest possible class."

