North Dakota Law Review

Volume 55 | Number 4 Article 3

1979

The Use at Revocation of Conditional Liberty Hearings of Suppressoin Hearing Admissions: An Erosion of The Efficacy of the Exclusionary Rule

Edward G. Mascolo

THE USE AT REVOCATION OF CONDITIONAL LIBERTY HEARINGS OF SUPPRESSION HEARING ADMISSIONS: AN EROSION OF "THE EFFICACY OF THE EXCLUSIONARY RULE"

*Edward G. Mascolo**

I. INTRODUCTION

The function of the exclusionary rule is to secure to the individual the protection of the fourth amendment[1] against unreasonable searches and seizures.[2] To implement this function, one accused of a crime is accorded an opportunity to move for the suppression in a criminal trial of the fruits of an illegal search or seizure. The admissibility of these fruits, however, can be blocked only upon "*timely* objection,"[3] which usually means before trial;[4] for if the movant's claim is not timely pressed, he will be deemed in the usual course of events to have waived his right to complain.[5]

This right to complain implicates privacy interests, for one who protests an unreasonable search or seizure must assert, and establish, a personal interest in the place or areas searched, or in the evidence seized, that is sufficient to satisfy a legitimate and societally recognized expectation of privacy from unreasonable

* Member of the Connecticut and District of Columbia Bars; Editor-in-Chief of the CONNECTICUT BAR JOURNAL, 1969-1973, and currently member of Editorial Board; B. A., Wesleyan University, 1949; LL.B., Georgetown University, 1952; currently research consultant to Office of Judicial Education, Judicial Department, State of Connecticut. The opinions expressed herein are those only of the author.

1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

2. Rakas v. Illinois, — U. S. —, —, 99 S.Ct. 421, 425 (1978); Stone v. Powell, 428 U. S. 465, 482 (1976); United States v. Calandra, 414 U. S. 338, 347 (1974); Simmons v. United States, 390 U. S. 377, 389 (1968).

3. Elkins v. United States, 364 U. S. 206, 223 (1960) (emphasis added).

4. *See, e. g.,* FED. R. CRIM. P. 12(b)(3), 41 (f); CONN. GEN. STAT. REV. §54-33f(1969).

5. United States v. Rollins, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied,* 424 U.S. 918 (1976); FED. R. CRIM. P. 12(f).

governmental intrusion into the invaded place or areas.[6] Such assertion will usually involve some property or possessory interest, or some other legitimate expectation-of-privacy interest, either in the place or areas searched or in the evidence seized.[7] Thus, to protect a legitimate expectation of privacy under the fourth amendment, a search victim is permitted to exclude; to exclude, he must establish the requisite privacy interest; and to establish such interest, he may expose himself to potential incrimination in another tribunal or forum.

The focus of this study will be on the prosecution's use of the pre-trial suppression hearing testimony of an accused, rendered by him to establish the privacy interest necessary to assert a fourth amendment right, in particular, the use of this testimony to revoke the conditional liberty of an accused on deferred sentence, probation, or parole for a prior offense, with special emphasis on the effect of such use upon the continued efficacy of the exclusionary rule.

II. SIMMONS V. UNITED STATES

In *Simmons v. United States,*[8] the Supreme Court came to grips with this issue and held that suppression hearing testimony by an accused may not thereafter be used against him at trial on the issue of guilt.[9] The Court reasoned that the potential use of such testimony at trial would act as a deterrent to some accused wishing to present the testimonial proof of standing required to assert a claim under the fourth amendment.[10] Moreover, the knowledge of subsequent use would act as a strong deterrent "in those marginal cases in which it [could not] be estimated with confidence whether the motion [would] succeed."[11] Thus, to permit such use created an unacceptable risk of deterring the assertion of marginal fourth amendment claims, thereby "weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior."[12]

Although *"[t]his was surely an analytically sufficient basis for decision,"*[13] the Court in *Simmons* went on to observe that the condition

6. Rakas v. Illinois, — U. S. —, —, 99 S. Ct. 421, 429, 430 & n.12, 433 (1978), and *id.* at —, 99 S. Ct. at. 434-36 (Powell, J., concurring).

7. *See id.* at —, 99 S. Ct. at 430 & n.12, 433, and *id.* at 435-36 (Powell, J., concurring).

8. 390 U. S. 377 (1968).

9. *Id.* at 394. However, if an accused, as a witness and not as a party, voluntarily testifies in a trial of another defendant in support of a motion to suppress, his testimony will be admissible in his own subsequent prosecution. United States v. Cecil, 457 F.2d 1178, 1181 (8th Cir. 1972).

10. 390 U. S. at 392-93.

11. *Id.* at 393.

12. McGautha v. California, 402 U. S. 183, 211 (1971) (interpreting the holding in *Simmons*).

13. *Id.* (emphasis added).

thus imposed on the good-faith assertion of fourth amendment rights was "of a kind to which this Court has always been peculiarly sensitive,"[14] for it posed the risk that the accused would incriminate himself through the later use of his testimony.[15] While acknowledging "[a]s an abstract matter" that the testimony might be voluntary, and that testimony to secure a benefit is not *per se* compelled within the meaning of the self-incrimination clause,[16] because one may refuse to testify and thereby forego the benefit, the Court nevertheless distinguished the situation in *Simmons* because "the 'benefit' to be gained is that afforded by another provision of the Bill of Rights. . . . "[17] In this setting, "an undeniable tension is created. Thus, in this case Garrett [the accused] was obliged either to give up what he believed, with advise of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances," concluded the Court, "we find it intolerable that one constitutional right should have to be surrendered in order to assert another."[18]

Although the efficacy of the exclusionary rule rationale in *Simmons* remains intact, there is some doubt as to the validity of its self-incrimination analysis. In *McGautha v. California,*[19] the defendant was convicted of first degree murder and sentenced to death by a jury that had determined the issues of guilt and punishment in a unitary trial. He argued that he was deprived of his due process right of allocution because the unitary trial procedures forced him to forego his right to address his sentencer in order to invoke his privilege against self-incrimination. Thus, he reasoned, this created a tension between constitutionally protected rights similar to that proscribed by the Court in *Simmons.*

In rejecting this argument,[20] the Court observed that "[w]hile we have no occasion to question the *soundness of the result* in *Simmons*

14. 390 U. S. at 393.

15. *Id.*

16. U. S. CONST. amend. V states, "No person. . . shall be compelled in any criminal case to be a witness against himself. . . ."

17. 390 U. S. at 394.

18. *Id.* However, where such surrender is neither compelled nor required, the testimony will be admissible. United States v. Dohm, 597 F.2d 535, 543-44 (5th Cir. 1979) (sanctioning trial use of bail hearing testimony) (2-1 decision).

19. 402 U. S. 183 (1971).

20. Since the self-incrimination analysis in *McGautha* is beyond the purview of this study, the rationale of the Court's holding will not be discussed at length. For further comment on *McGautha, see* Note, *Revocation of Conditional Liberty for the Commission of a Crime: Double Jeopardy and Self-Incrimination Limitations,* 74 MICH. L. REV. 525, 543-45 (1976), which concludes that "[t]he authority of *McGautha*. . . seems to have been vitiated", *Id.* at 545; *see* People v. Rocha, 86 Mich. App. 497, 507-08, 272 N.W.2d 699, 704 (1978), by the Supreme Court's decision in *Brooks v. Tennessee,* 406 U. S. 605, 609, 610-12 (1972) (self-incrimination clause prohibits a state from regulating the timing, or order, of a defendant's testimony, or from denying the right to give such testimony if a defendant

and do not do so, to the extent that its rationale was based on a 'tension' between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question. . . . "[21] However, the Court implicitly emphasized that the holding in *Simmons* "really rested on the fourth amendment,"[22] for it characterized the purely fifth amendment interest implicated in *Simmons* as insubstantial.[23] Moreover, it noted that the accused in *Simmons* did not have a strong claim "to be relieved of his ill-advised 'waiver' [of the fifth amendment privilege against self-incrimination] . . . . "[24] It is thus seen that the fourth amendment basis and rationale for *Simmons* have not been impaired by subsequent decisions of the Supreme Court, and may be invoked for protection against any "weakening [of the] efficacy of the exclusionary rule as a sanction for unlawful police behavior."[25]

III. THE ARGUMENT AGAINST THE USE OF SUCH ADMISSIONS

While there does not appear to be any reported decision directly on point, a compelling argument against the use of such admissions can be made on the basis of existing precedents.

Since the *Weeks*[26] decision in 1914, the exclusionary rule has demonstrated its efficacy for enforcing fundamental rights secured to the individual by the fourth amendment.[27] The vehicle for giving

---

does not comply with the requirements of timing), discussed in Note, *supra,* 74 MICH. L. REV. at 545. *See generally* New Jersey v. Portash, 99 S. Ct. 1292, 1295 (1979) (implicitly recognizing, in citing to *Brooks,* that a judicial ruling sanctioning the impeachment use at trial of immunized grand jury testimony effectively penalized the accused by causing him to forego testifying in order to preserve his privilege against compulsory self-incrimination). It has also been suggested that *Simmons* is sufficiently distinguishable from *McGautha* to retain its precedential vitality. Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings,* 76 Colum. L. Rev. 674, 708-12 (1976). *McGautha* has been interpreted as impliedly holding that *Simmons* should have been decided on the basis of the Supreme Court's supervisory powers over trials in federal courts rather than the requirements of the Constitution. People v. Coleman, 13 Cal. 3d 867, 881, 533 P.2d 1024, 1036-37, 120 Cal. Rptr. 384, 396-97 (1975) (en banc). This misconceives the *McGautha* emphasis upon the fact that *Simmons* rested on fourth amendment, as well as fifth amendment, grounds. "It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim." 390 U. S. at 392-93. *See* 402 U. S. at 212; 390 U. S. at 393; Note, *Revocation of Conditional Liberty for the Commission of a Crime: Double Jeopardy and Self-Incrimination Limitations,* 74 MICH. L. REV. 525, 544 n.91 (1976). Furthermore, *Simmons* has been interpreted as protecting fourth amendment rights. *See, e. g.,* State v. Wright, 266 Ore. 163, 168 n.2, 511 P.2d 1223, 1225 n.2 (1973).

21. 402 U. S. at 212-13 (emphasis added).

22. Note, *Revocation of Conditional Liberty for the Commission of a Crime: Double Jeopardy and Self-Incrimination Limitations,* 74 MICH. L. REV. 525, 544 n.91 (1976).

23. 402 U. S. at 212.

24. *Id.*

25. *Id.* at 211.

26. Weeks v. United States, 232 U. S. 383 (1914), (the Court's first enunciation of the fourth amendment exclusionary rule). United States v. Janis, 428 U. S. 433, 443 (1976).

27. "[T]he rule is. . . designed to safeguard Fourth Amendment rights," United States v.

impetus to the exclusionary rule is a procedural device[28] known as the motion to suppress. However, before a victim of an alleged illegal search or seizure will be heard to complain, he must assert, and establish, a sufficient privacy interest under the fourth amendment. Traditionally, this interest has been referred to as "standing."[29] More recently, it has been characterized as the "substantive Fourth Amendment doctrine."[30]

With the advent of the stricter requirements for standing announced recently in *Rakas v. Illinois,*[31] a movant for suppression carried a heavy burden of persuasion to qualify as an aggrieved person under the amendment. This means that he will be required to prove that he possesses a personal interest either in the locus of the search or in the evidence seized.[32] Such proof will usually involve, if not actually require, some property or possessory interest, or some other legitimate expectation-of-privacy interest.[33] To this end, it may prove necessary, on occasion, that he take the stand at a suppression hearing and admit ownership of, or some other possessory interest in, the evidence seized.[34] In this setting, his testimony will be regarded "as an *integral* part of his Fourth Amendment exclusion claim."[35] Moreover, "[t]estimony of this kind, which links a defendant to evidence which the Government considers important enough to seize and to seek to have admitted at trial, *must often be highly prejudicial to a defendant.*"[36]

This prejudice has been heightened by the privacy interest standards mandated by *Rakas,* because they will necessitate a certain exposure to punitive action against the defendant in another tribunal. For example, in *Rakas* itself, petitioners asserted neither a property nor a possessory interest in the automobile searched, nor

---

Calandra, 414 U. S. 338, 348 (1974), and "is an essential part of both the Fourth and Fourteenth Amendments. . . ." Mapp v. Ohio, 367 U. S. 643, 657 (1961).

28. *See* Jones v. United States, 362 U. S. 257, 260, 264 (1960); Edwards, *Standing to Suppress Unreasonably Seized Evidence,* 47 NW. U. L. REV. 471, 471-72 (1952).

29. *See* Simmons v. United States, 390 U. S. 377, 389-91 (1968).

30. Rakas v. Illinois, —, U. S. —, —, 99 S. Ct. 421, 428 (1978) (emphasizing and endorsing the "[r]igorous application of the principal that the rights secured by [the Fourth] Amendment are personal, in place of a notion of 'standing' ").

31. — U. S. —, 99 S. Ct. 421 (1978).

32. *Id.* at —, 99 S. Ct. at 429, 430 en.12, 433, and *id.* at —, 99 S. Ct. at 434-36 (Powell, J., concurring). Furthermore, such proof will require more than either a casual interest or presence, and a mere legitimate presence, with the consent of the owner or of one having the lawful right to confer such presence, will not be controlling of the legitimacy of one's expectation of privacy, the resolution of which will require an *ad hoc* analysis of all the surrounding circumstances, and not simply the fact that the movant was the "target" of the search. *Id.* at —, 99 S. Ct. at 426-28, 429-30 & n.12, 432-33, and *id.* at —, 99 S. Ct. at 435, 436 (Powell, J., concurring), qualifying, and implicitly overruling in part, *Jones v. United States,* 362 U. S. 257, 261, 267 (1960).

33. *See id.* at —, 99 S. Ct. at 430 & n.12, 433, and *id.* at 435-36 (Powell, J., concurring).

34. *See* Simmons v. United States, 390 U. S. 377, 390-91 (1968).

35. *Id.* at 391 (emphasis added).

36. *Id.* (emphasis added).

an interest in the sawed-off rifle and rifle shells seized. Consequently, they lacked any legitimate expectation of privacy as mere passengers in the areas of the car from which the evidence was seized.[37] This denial of interest in the items seized precluded exposure to detrimental action elsewhere, but at the expense of prosecuting to detrimental action elsewhere, but at the expense of prosecuting fourth amendment claims. Conversely, if petitioners in *Rakas* had satisfied the privacy interest standards, then their testimony would have exposed them to prejudicial consequences beyond the immediate criminal prosecution. In either event, the effect would be to deter the prosecution of marginal claims under the fourth amendment, "thus weakening the efficacy of the exclusionary rule. . . ."[38]

These consequences are "most extreme in prosecutions"[39] to revoke the conditional liberty of persons on deferred sentence, probation, or parole, for virtually any suppression hearing admission of a privacy interest in the objects of a search or seizure will almost surely trigger a certain exposure to punitive action against a defendant at large on conditional liberty for a prior offense.[40] This exposure, and resultant chilling effect, can be particularly severe where the movant for suppression is confronted with the claim that since conditional liberty revocation "is not a

37. — U. S. at —, 99 S. Ct. at 433.

38. McGautha v. California, 402 U. S. 183, 211 (1971); Simmons v. United States, 390 U. S. 377, 392-93 (1968).

39. Simmons v. United States, 390 U. S. 377, 391 (1969).

40. For example, in *Rakas* the objects seized were a sawed-off rifle and rifle shells, which had been seized by the police during a search of an automobile in which petitioners had been traveling as passengers, and which were offered into evidence at their trial by the prosecution. — U. S. at —, 99 S. Ct. at 423.

Proceedings to revoke conditional liberty on the basis of suppression hearing admissions made to prosecute fourth amendment claims implicate constitutional issues that are analogous to, but legally distinct from, the fifth amendment issues of self-incrimination and double jeopardy involved in revocation proceedings initiated in response to the commission of a crime. *See generally* Andresen v. Maryland, 427 U.S. 463, 472-77 (1976); Fisher v. United States, 425 U. S. 391, 400-1, 407-9 (1976) (the fourth and fifth amendments protect separate privacy interests); Couch v. United States, 409 U.S. 322, 335-36 (1973) (same); McGautha v. California, 402 U.S. 183, 211-13 (1971); Mascolo, *The Use at Trial of Suppression Hearing Admissions: An Erosion of the Privilege Against Self-Incrimination,* 72 DICK. L. REV. 1, 13-15 (1967). For discussion of these latter issues, *see* Note, *Revocation of Conditional Liberty for the Commission of a Crime: Double Jeopardy and Self-Incrimination Limitations,* 74 MICH. L. REV. 525 (1976). However, this is not to imply that certain activity may not violate both amendments. *See generally* Fisher v. United States, 425 U.S. 391, 410 n.11 (1976) (by implication). For analysis of the issues implicated by the use of a defendant's revocation hearing testimony at his subsequent trial on the underlying charge, see People v. Coleman, 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975) (*en banc*); People v. Rocha, 86 Mich. App. 497, 272 N.W.2d 699 (1978). For discussion of the admissibility of illegally seized evidence in probation revocation proceedings, see Annot., 30 A. L. R. FED. 824 (1976) (federal proceedings); Annot., 77 A.L.R. 3d 636 (1977) (state proceedings); and for the admissibility in such proceedings of a statement obtained in violation of the *Miranda* Rule (Miranda v. Arizona, 384 U. S. 436 (1966)), see Annot., 30 A.L.R. FED. 824 (1976) (federal proceedings); Annot., 77 A.L.R. 3d 669 (1977) (state proceedings).

The issues raised in this study are not to be confused with the deterrence rationale of the exclusionary rule, which has as its "primary justification. . . the deterrence of *police* conduct that violates Fourth Amendment rights," Stone v. Powell, 428 U. S. 465, 486 (1976) (emphasis added). What is implicated here is the deterrence posed by prosecutive conduct to the very *invocation itself* of

stage of a criminal prosecution,"[41] so that "the full panoply of rights due a defendant in such a proceeding does not apply to. . . revocations,"[42] the procedures required to vindicate rights secured under the fourth amendment are irrelevant to revocation proceedings.

Although there is a certain facile logic in this approach, it will not withstand close examination. In the first place, it ignores the fact that conditional liberty revocation "does result in a loss of liberty,"[43] and, accordingly, the requirements of due process in general apply to such proceedings.[44] Since termination of conditional liberty "inflicts a 'grievous loss' on the [individual] and often on others,"[45] due process ensures a "guarantee of fundamental fairness"[46] so as to protect "the individual against arbitrary action. . . ."[47] Surely, it will do violence to this concept of "fairness" to deter a search victim from speaking up in defense of his fourth amendment right of privacy by using such testimony to revoke his liberty.[48] In such a setting, the "irrelevance" will become painfully relevant.

Furthermore, it is not relevant to argue that admissibility should be permitted onthe basis of the relaxed rules of evidence permitted at revocation hearings.[49] We are not primarily concerned here with the quality of evidence, which, concededly, is trustworthy. Rather, our concern is with the deterrent effect of such admissibility upon the vindication of fourth amendment rights in an adversary criminal proceeding.

More fundamentally, revocation use of suppression hearing testimony would severely weaken the efficacy of the exclusionary rule in the very type of situation that most concerned the Supreme Court in *Simmons*: "the prosecution of *marginal* Fourth Amendment claims."[50] In short, such use would surely create "an unacceptable

---

the exclusionary rule in a *criminal* prosecution. Moreover, although I continue to adhere to the position, previously expressed, that the subsequent use of suppression hearing testimony on the issue of guilt or innocence is a violation of the privilege against self-incrimination, Mascolo, *The Use at Trial of Suppression Hearing Admissions: An Erosion of the Privilege Against Self-Incrimination,* 72 DICK. L. REV. 1, 28-33 (1967), a view endorsed in *Simmons,* 390 U. S. at 393-94, United States v. Kahan, 415 U. S. 239, 242 (1974) (per curiam), that thesis lies beyond the pale of this study, which is concerned solely with the deterrent effect of such use upon the prosecution of fourth amendment claims.

41. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

42. Morrissey v. Brewer, 408 U.S. 471, 480 (1972). For example, the exclusionary rule is not ordinarily applicable to revocation proceedings. State v. Davis, ___ So.2d ___, ___ (La. 1979). However, this restriction is limited to the suppression of illegally *seized* evidence, and is irrelevant to revocation *use* of suppression hearing *testimony*.

43. Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (footnote omitted).

44. Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

45. *Id.*

46. Taylor v. Kentucky, 436 U.S. 478, 487 n.15, (1978).

47. Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 302 (1937) (Cardozo, J.).

48. *See generally* Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972).

49. *See* Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

risk of deterring"[51] the vindication of fourth amendment rights. Indeed, it would be a bitter irony if the movant succeeded in prosecuting his fourth amendment claim, thereby leading to a dismissal of the criminal charges pending against him, only to have his conditional liberty revoked primarily on the basis of his suppression hearing testimony that was presented solely to obtain a benefit to which he was constitutionally entitled. And, it would be equally bitter if such vindication exposed him to a more severe sentence in the revocation proceedings than could have been imposed in the criminal case had suppression been denied. However, this Hobson's-choice dilemma would not end here, for if he refrained from prosecuting the fourth amendment claim, he would increase the risk of conviction, thereby increasing his exposure to revocation, which he originally sought to avoid by abstaining from exclusion. Criminal proceedings are so fraught with variables that such an eventuality may not be discounted. Furthermore, revocation use should not be made to hinge on the outcome of the motion to suppress, because the deterrent effect of such use attaches *prior* to the ruling on the motion. For example, if the case against the accused is a weak one, he may decide that it is preferable to forego the prosecution of a marginal fourth amendment claim than it is to render suppression hearing testimony that may prove to be most damaging to him in revocation proceedings. Therefore, the suppression hearing testimony of an accused should not thereafter be admitted against him on the issue of guilt[52] at a hearing on the revocation of his conditional liberty, "unless he makes no objection."[53]

IV. CONCLUSION

Simmons v. United States stands as an immutable barrier to the use, on the issue of guilt, of a defendant's suppression hearing testimony, rendered in prosecution of a fourth amendment claim, in a subsequent hearing to revoke his conditional liberty. It would be an empty victory indeed to allow a defendant to successfully vindicate his constitutional rights only at the eventual cost

50. McGautha v. California, 402 U.S. 183, 211 (1971) (emphasis added); Simmons v. United States, 390 U.S. 377, 392-93 (1968).

51. McGautha v. California, 402 U.S. 183, 211 (1971).

52. It will be available, of course, for impeachment or rebuttal purposes on matters collateral to the issue of guilt. Walder v. United States, 347 U.S. 62, 65 (1954); *see* Simmons v. United States, 390 U.S. 377, 394 (1968). And, if he is convicted in the criminal trial, that fact will also be admissible.

53. Simmons v. United States, 390 U.S. 377, 394 (1968).

of his liberty. This result could only act as a severe deterrent to any person at large on conditional liberty who seeks to invoke the protection of the exclusionary rule, in particular, to "the prosecution of marginal Fourth Amendment claims. . . ."[54] Such a "pernicious doctrine"[55] would reduce the fourth amendment "to a form of words,"[56] and, accordingly, should be resolutely rejected by the Courts. Finally, collateral use of suppression hearing testimony in revocation hearings would do violence also to the concept of "fundamental fairness" under the due process clause of the fifth and fourteenth amendments.

54. McGautha v. California, 402 U.S. 183, 211 (1971).
55. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
56. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.).