ever, that the state may prove the absence of necessity by circumstantial evidence,[11] and it has been held that the operation was unnecessary where the evidence indicated that the doctor did not ascertain whether an infection had set in before operating and the woman had been healthy prior thereto,[12] where the only evidence of indisposition was a headache and indigestion.[13] On the other hand, the good health and physical condition of the woman will not be presumed in the absence of testimony tending to show them.[14]

While Anglo-American law emphasizes the crime against society for thwarting the process of procreation, that of the Soviet Union and Germany is apparently more concerned with the interests of the mother. French law, however, since the early Napoleonic codes, has been severe. In the Soviet Union abortions were virtually legalized, prohibited only where the pregnancy is of more than three months' duration or within six months of a prior operation.[15] Although the German Code does not provide for exceptions to the general prohibition,[16] in a recent case, similar to one in the United States in which the defendant was convicted,[17] where there was danger of suicide due to pregnancy resulting from extra-marital relations, the court held that if the abortion was the indispensable means for saving the mother's life, the operation by the doctor was not unlawful.[18] The result was achieved by applying sec. 54 of the German Criminal Code relating generally to the defense of necessity to preserve life. The French Code likewise permits no exceptions,[19] but in contrast to the liberal interpretation of the German court, a conviction was recently sustained although the operation was performed for "medical purposes."[20]

It is hoped that the reforms to be suggested by the Interdepartmental Committee in England following their investigation[21] after this significant decision, will eliminate the necessity of awkward statutory constructions by courts as in the instant case, and inspire American legislatures to take similar action.

Equity—Vendor and Purchaser—Relief against Forfeiture—[England].—The plaintiff contracted to buy land in Tasmania from the defendant for £321,000, which was to be paid in instalments. The agreement expressly provided that time was of the

[11] Gammack v. State, 6 N.E. (2d) 328 (Ind. 1937); Diehl v. State, 157 Ind. 549, 62 N.E. 51 (1901); Rhodes v. State, 128 Ind. 189, 27 N.E. 866 (1891); State v. Bly, 99 Minn. 74, 108 N.W. 833 (1906); Dixon v. State, 46 Neb. 298, 64 N.W. 961 (1895); State v. Longstreth, 19 N.D. 268, 121 N.W. 1114 (1909); State v. Lee, 69 Conn. 186, 37 Atl. 75 (1897); State v. Watson, 30 Kan. 281, 1 Pac. 770 (1883); State v. Wells, 35 Utah 400, 100 Pac. 681, 19 Ann. Cas. 631 (1909).

[12] State v. Powers, 155 Wash. 63, 282 Pac. 439 (1929) "The authorities are to the effect that when it is shown that the woman was healthy and in a normal condition and medicine was administered or an operation performed on her to procure a miscarriage the evidence is sufficient to find that the miscarriage was not necessary to save the woman's life."

[13] State v. Martin, 178 Wash. 290, 34 P. (2d) 914 (1934).

[14] State v. Wells, 35 Utah 400, 100 Pac. 1081 (1909).

[15] In 1936, however, the Soviet Union completely reversed its policy and abortion is now illegal except where performed to save the mother's life or where there is an inheritable disease in the family.

[16] German Criminal Code § 218. [17] Hatchard v. State, 79 Wis. 357, 48 N.W. 380 (1891).

[18] 61 Reichsgericht 242 (March 11, 1927).

[19] Code Pénal art. 317 (1923) Petite Collection Dalloz.

[20] Taussig, Abortion Spontaneous and Induced 424 (1936). [21] 186 L.T. 87 (1938).

essence, and that on any default in payment the vendor could either resell the land and hold the vendee for any deficiency, or could rescind the agreement and all payments already made on the contract would be forfeited. After paying £139,500 of the purchase price, and after receiving one parcel of the land, to which £99,300 of the purchase money was attributable, the plaintiff defaulted. The defendant notified him that it rescinded the agreement pursuant to its terms, and that the payments were forfeited. Five years later the plaintiff instituted this suit for restitution of the payments. *Held*, for the defendant. *Mussen v. Van Dieman's Land Co.*[1]

In refusing relief the court said that there is nothing unjust or unconscionable in enforcing the provision for forfeiture since in so doing it was merely carrying out the terms of the contract. But in *Steedman v. Drinkle*,[2] where the agreement, like that in the instant case, provided that time was of the essence and that upon default the vendor could determine the contract and keep the payments, the Privy Council said "the stipulation for forfeiture . . . . was in the nature of a penalty against which relief should be granted." The High Court of Justice in the present case distinguished that decision on the fact that there the vendee had tendered the purchase-money and had sued for specific performance, and said that only when the purchaser is able and willing to perform is it unconscionable for the vendor to retain the payments. Since English courts will not grant specific performance to a party in default where time is "of the essence,"[3] as in the principal case, to require tender of performance as a condition precedent to granting relief is to demand a useless form. Since the holding in the *Steedman* case committed English courts to the view that the purchaser's equity should be protected, the present holding seems unjustifiable since it denies relief to the one who needs it most—the impecunious vendee, to whom it is a great burden to comply with the form of proffering payment.

In a majority of the American cases a purchaser in possession has been relieved against provisions making time essential.[4] In jurisdictions where even after default specific performance is decreed[5] the requirement of tender may be justified as a proof of the plaintiff's good faith in demanding restitution, and to show that he is not merely trying to escape from a bad bargain because of a drop in the market value of the land. Most American courts deny restitution of payments, however, where time is stipulated to be of the essence.[6]

It has been said that ordering repayment in these cases, by adding an element of uncertainty to bargaining,[7] would result in injustice to the vendor since he may have invested the advance payments or otherwise have changed his position. But, since the purchaser "is not entitled to a return of his purchase-money until he has allowed, as a deduction therefrom, all damages caused by his breach,"[8] the vendor is protected.

[1] 54 T.L.R. 225 (1938). [2] [1916] A.C. 275.

[3] See cases collected 1 Ames, Cases in Equity Jurisdiction 335, n. 1 (1904); Pomeroy, Specific Performance § 389 (3d ed. 1926); Steedman v. Drinkle [1916] A.C. 275.

[4] 3 Williston, Contracts § 791, cases cited n. 15.

[5] *E.g.*, Cheney v. Libby, 134 U.S. 68 (1890); Mound Mines Co. v. Hawthorne, 173 Fed. 887 (C.C.A. 8th 1909); Edgerton v. Peckham, 11 Paige (N.Y.) 352.

[6] 3 Williston, *op. cit. supra* note 4, at § 852, n. 7, 8.

[7] Loyd, Penalties and Forfeitures, 29 Harv. L. Rev. 117, 135 (1915).

[8] Lytle v. Scottish American Mtge. Co., 122 Ga. 458, 469, 50 S.E. 402, 407 (1905).

The vendee must show that the amount retained is greater than the injury done. The court refused to consider that question here, although the defendant asserted that its damage was greater than the sum paid.

Where, as appears probable in this case, performance has progressed far enough to shift the risk of loss to the purchaser,[9] the relief granted to the defaulting purchase-money mortgagor presents a strong analogy.[10] There seems to be no good reason why the policy of relieving mortgagors and defaulting contractors under building contracts and buyers of chattels by conditional sale should not also be applicable to this situation.[11]

Evidence—Unreasonable Search and Seizure—Admissibility in Civil Proceedings —[Federal].—Federal officers obtained liquor on the defendant's premises under an illegally issued search warrant. Criminal proceedings for unlawful possession of spirits were instituted by the United States and abandoned; the defendant secured the return of the liquor so obtained. The United States then brought assumpsit proceedings against the defendant for non-payment of duties on the liquor. Much of the evidence obtained under the illegally issued warrant was admitted in this suit. The District Court awarded judgment for the United States, and the defendant appealed. *Held*, reversed and remanded. The use of evidence obtained by an unreasonable search of the defendant's premises was reversible error. *Rogers v. United States*.[1]

The instant case sets squarely before the court the alternatives of either limiting the rule excluding evidence obtained by an unreasonable search[2] to criminal proceedings, or extending it to include suits of a civil nature. As authority for its decision to expand the rule the court adduces the case of *Silverthorne v. United States*.[3] The question there under consideration was whether or not photographs of evidence obtained by an unreasonable search could be used to force production of the originals at *criminal proceedings*. In nullifying the attempt by the prosecution to legalize in two steps what was illegal in one, Justice Holmes said: "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely evidence so obtained shall not be used before the court but that *it shall not be used at all.*" There is no indication that he was adverting to use of the evidence in a subsequent civil proceeding; no such question was before him.

[9] See Diller, Legislation and Risk of Loss Cases, 5 Univ. Chi. L. Rev. 260 (1938).

[10] For examples of use of this analogy see Lytle v. Scottish American Mtge. Co., 122 Ga. 458, 50 S.E. 402 (1905); Walker v. Casgrain, 101 Mich. 604, 60 N.W. 291 (1894); Wilder v. Haughey, 21 Minn. 101 (1874); Button v. Schroyer, 5 Wis. 598 (1856). *Cf. In re* Dagenham Dock Co. 8 Ch. App. 1022 (1873); Great West Lumber Co. v. Wilkins, 7 W.L.R. 166 (1908). Also 3 Williston, *op. cit. supra* note 4, at §§ 791, 852.

[11] For discussions of problems presented by forfeiture clauses in land contracts see Ballantine, Forfeiture for Breach of Contract, 5 Minn. L. Rev. 329 (1921); Corbin, The Right of the Defaulting Vendee to the Restitution of Instalments Paid, 40 Yale L.J. 1013 (1934); New York Law Revision Comm'n Report for 1937, 343 ff.; 2 Chafee and Simpson, Cases on Equity 1248 ff. and authorities there cited; Rest. Contracts § 357 (1932).

[1] 97 F. (2d) 691 (C.C.A. 1st 1938).

[2] 4 Wigmore, Evidence § 2183, 2184 (2d ed. 1923 and supp. 1934).

[3] 251 U.S. 385 (1920).