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).

The tendency to limit the applicability of the fourth amendment[4] to criminal, penalty, and forfeiture suits has rendered the instant case unique. The frequent assertion that civil proceedings were not historically within the purview of the immunity[5] is elliptical and should read that the term search and seizure, as comprehended by the amendment, does not include those searches which have as their objective the institution of civil proceedings against the defendant. The intent of the framers of the Constitution was to provide a cause of action against such abuses of power as had occurred in England under general warrants[6] and in the colonies under writs of assistance.[7] These instruments gave the widest discretion to petty officers, and their authorized issuance made redress inaccessible. The general warrant bade the official search indiscriminately for evidence with which to indict unnamed persons with political crimes. Writs of assistance, issuing direct from the Chancellor, empowered any officer for an indefinite period promiscuously to ferret out and confiscate smuggled goods. There was no need of affording a remedy against federal officers in a civil capacity; this was obtainable in the ordinary trespass action.[8] It was only when these officials were operating under such authority as general warrants or writs of assistance that they might be insulated from recovery. Hence, the term search and seizure was restricted by the courts to such cases as involved examinations which were to culminate in a criminal indictment or forfeiture of property.[9]

A case which appears to be precisely in point is *Camden County Beverage Co. v. Blair*.[10] Prohibition officers broke into the petitioner's warehouse without a warrant and took bottles containing alcohol over the legal percentage. The pending proceeding was to cancel petitioner's beverage permit. The latter brought a bill in the District Court praying for suppression of the evidence so obtained. The court adduced many authorities to bolster its contention that the fourth amendment is not applicable to

[4] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly the place to be searched, and the persons or things to be seized."

[5] *In re* Meador, 16 Fed. Cas. 1294 (D.C. Ga. 1869); *In re* Strouse, 23 Fed. Cas. 261 (D.C. Nev. 1871); Camden County Beverage Co. v. Blair, 46 F. (2d) 648 (D.C. N.J. 1930); Willis, Constitutional Law 540 (1936). See also United States v. Three Tons of Coal, 28 Fed. Cas. 149 (D.C. Wis. 1875); Boyd v. United States, 116 U.S. 616, 622, 624, 630–635 (1886).

[6] Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 363 (1921); Harno, Evidence Obtained by Illegal Search and Seizure, 19 Ill. L. Rev. 303 (1925).

[7] Fraenkel, *op. cit. supra* note 6, at 364, 365.

[8] State v. Wills, 91 W.Va. 659, 114 S.E. 261 (1922).

[9] More recently, however, there has been a trend toward expansion of the scope of the amendment to include pending administrative proceedings. It is based on the feeling that the spirit transcends the origin of the immunity. Thus protection is afforded against authorized "governmental fishing expeditions," which might not otherwise be available. If the basis for extending the immunity is insufficiency of redress against authorized but unwarrantable searches, whatever their objective, the trend is a salutary one. These administrative cases, however, are not directly helpful, for they involve issuance of an injunction restraining the proposed search. None of them involve the question as whether or not the evidence, if obtained, should be excluded in a subsequent civil suit. *In re* Andrews Tax Liability, 18 F. Supp. 804 (Md. 1937); Jones v. Securities and Exchange Commission, 298 U.S. 1 (1936).

[10] 46 F. (2d) 648 (D.C. N.J. 1930).

civil proceedings[11] and consequently held the evidence admissible. In the *Camden* case, since no illegal search warrant had been issued, and criminal or forfeiture proceedings were not anticipated, no search and seizure as comprehended by the amendment had been committed. There were no grounds, therefore, for the suppression of evidence.[12]

There is, then, a fundamental distinction between the *Camden* case and the instant decision. In the latter, the court's basic assumption was that an unreasonable search, as comprehended by the fourth amendment, had been committed. This is doubtless due to the fact that a search warrant was illegally issued, a direct transgression of one of the clauses of the amendment. The court, however, seemed to think that the application of the amendment necessitated an automatic extension of the exclusion rule evolved for criminal cases. That rule, which had its origin in the *Boyd* case,[13] excludes all evidence obtained by an unreasonable search for criminal, penalty, and forfeiture proceedings. The reason for the existence of the rule has had its most recent expression in the Supreme Court in *Agnello v. United States*.[14] There Mr. Justice Butler, speaking for a unanimous court, said: "The provision of the Fifth Amendment invoked is this: 'No person .... shall be compelled in any criminal case to be a witness against himself.' .... It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of the rights under the Fourth Amendment."

This linking together of the fourth and fifth amendments in criminal proceedings has had adequate discussion elsewhere.[15] It is sufficient for our purpose to note that this is no basis for excluding the evidence in a civil proceeding. Its admission here would in no way prevent its exclusion at a subsequent criminal trial. Nor need the defendant here answer any question relative to the evidence which might tend to incriminate him in future proceedings.[16] The aegis of the immunity extends that far in any case.

There is no indication that the court in the instant case considered the fifth amendment as the true rationale of the exclusion rule in criminal cases. The *Silverthorne* case points toward a different basis: namely, that without the exclusion rule the fourth amendment would be reduced to a mere form of words. There is some merit to this contention; and if the amendment is to apply, in certain instances, to civil proceedings, perhaps the concomitant exclusion rule should likewise be adopted. Federal officers are too often judgment proof; and since no redress can be had against the government, the protection is not commensurate with the importance of the guaranty. Practically, however, the wisdom of any further hampering of courts by excluding evidence is questionable.[17] Their function is to see that justice is done between the two parties litigant, and the use of evidence, however obtained, facilitates

[11] *Supra* note 5.

[12] The only basis for exclusion is the fourth amendment. Wigmore *op. cit. supra* note 2.

[13] Boyd v. United States, 116 U.S. 616 (1886). [14] 269 U.S. 20 (1925).

[15] Wigmore, *op. cit. supra* note 2, at §§ 2183, 2184, 2264. See also People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926), for a trenchant and compact discussion of the values at stake; Corwin, Self-Incrimination, 29 Mich. L. Rev. 1, 191 (1930).

[16] Corwin, *op. cit. supra* note 15.

[17] Wigmore, *op. cit. supra* note 2, at §§ 2183, 2184, 2264.

the consummation of this function. Any question as to the mode of obtaining the evidence is collateral. Where it is a question of deprivation of liberty by incarceration, payment of a penalty, or forfeiture of property, the courts' solicitude for the defendant, merely as a matter of policy, is justifiable. Where, however, none of these issues is at stake, the reasons for extending the exclusion rule are not apparent.

Insurance—Interpretation of Public Liability Policy—[Ohio].—The plaintiff agreed with her brother, the defendant, to pay the expenses of a trip in the latter's automobile to see their father. Because of the defendant's negligent driving, the plaintiff sustained injuries for which she recovered damages against the defendant,[1] the court holding that she was not a guest under the Ohio "guest statute."[2] She then sought recovery against the defendant's insurer under a public liability policy, the insurer contending that the plaintiff was a "passenger for a consideration" within the clause denying the insurer's liability to such persons. *Held*, for the plaintiff, that she was not a "passenger for a consideration" within the meaning of the policy. *Beer v. Beer*.[3]

Since in the original suit against her brother the plaintiff was held not to be a "guest," the contention of the insurance company that she must be a "passenger for a consideration," would effectuate its apparent purpose to prevent *any person* riding in an insured's car from recovering against an insurance company under a public liability policy. Even though an insurance company could prove that its actual purpose in inserting the restrictive clause was to deny its liability to *all* riders in the insured's car, courts may hold with perfect logic that "one may be a passenger in an automobile without being a guest . . . . or a passenger for hire in the legal sense of the word,"[4] and may allow such residual class of riders to recover damages against an insurer.

But it requires skillful sailing to steer between these two obstacles to recovery against insurance companies, since escape from one horn of the dilemma is likely to impale the plaintiff on the other. Much depends, therefore, on the definition of the phrase "passenger for a consideration." Courts differ in their definition of this term. Thus in some jurisdictions a rider falls in this category if it appears only that he agreed prior to the trip to contribute to the expenses of running the car.[5] By this criterion the plaintiff in the instant case could not recover against the insurance company. An alternative test requires that the passenger must have agreed to contribute more than merely the running expenses of the car or his share thereof; he must also have shared the cost of wear and tear on the car.[6] The Ohio court seems to have

[1] Beer v. Beer, 52 Ohio App. 276, 3 N.E. (2d) 702 (1935).

[2] "The owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest while being transported without payment therefor . . . . unless such injuries or death are caused by the wilful or wanton misconduct of such operator. . . . ." Ohio Gen'l Code, § 6308–6.

[3] 16 N.E. (2d) 413 (Ohio 1938).

[4] Knutson v. Lurie, 217 Iowa 192, 251 N.W. 147 (1933).

[5] Reed v. Bloom, 15 F. Supp. 600 (Okla. 1936); Indemnity Insurance Co. of North America v. Lee, 232 Ky. 556, 24 S.W. (2d) 278 (1930).

[6] Ocean Accident and Guarantee Corporation v. Olson, 87 F. (2d) 465 (C.C.A. 8th 1937); Gross v. Kubel, 315 Pa. 396, 172 Atl. 649, 95 A.L.R. 146 (1934). *Cf.* Jensen *et al.* v. Canadian