in the taxing statutes is that Congress sought to tax only *net* income[23] and that interest as the cost of borrowed money is a normal business expense.[24] The corporation borrowed money from the holders of the hybrid securities by agreeing to pay not only a fixed return but also the share of their profits.[25] Both payments may consequently be said to represent the cost of the money borrowed.

The taxation cases reenforce the moral brought home so forcibly in the reorganization field: a simplified security structure is necessary if intelligent legal discrimination is to be made between various classes of investors.[26]

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**Insurance—Reformation of Reinsurance Policy for Variance from Terms of Binder Agreement—[Federal].**—The plaintiff, having insured several buildings for another, sought reinsurance from the defendant. A binder was secured providing for reinsurance on all losses over $100,000 "on any one building." The plaintiff's broker, in preparing a suggested form for the final policy, substituted a provision of reinsurance coverage on the excess over $100,000 "on any one loss." An experienced employee of the defendant examined the form, concluded that it was satisfactory, and a policy based on that form was issued to the plaintiff. A loss occurred, amounting to substantially more than $100,000 on all of the buildings, but less than that amount on any one. The plaintiff brought suit on the policy. The defendant counterclaimed asking reformation, and judgment was given for the plaintiff. On appeal, *held* (one dissent), reversed. The policy should be reformed to the terms of the binder agreement. *Tokio Marine & Fire Ins. Co. v. National Union Fire Ins. Co.*[1]

The basis for the divergence between the majority and dissenting opinions was not clearly enunciated. The majority was of the opinion that the reinsurer had a right to "rely upon literal conformity" of the policy with the binder, while the dissenting justice stated that there was "no mistake whatever as to the terms of the policy." It would seem, however, that the decision should depend upon whether or not the parties intended that the agreement executed in the binder be embodied in the policy.

If, as the majority of the court tacitly assumed, the policy and binder were intended to be identical, then the result reached seems sound,[2] for the requirements for reformation are satisfied. Those requirements usually stated[3] are that there must be: (1) an

[23] There has been discussion of whether Congress could constitutionally tax gross income. Magill, Taxable Income c. 9 (1936).

[24] Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560 (1932).

[25] Where the same purpose is achieved by giving a share of stock along with the bond, a distinction must be made for administrative convenience, since it is highly probable that the stock and the bond will become separated.

[26] Levi and Moore, Bankruptcy and Reorganization: A Survey of Changes, 5 Univ. Chi. L. Rev. 1, 7 (1937).

[1] 91 F. (2d) 964 (C.C.A. 2d 1937).

[2] Snell v. Ins. Co., 98 U.S. 85 (1878); Griswold v. Hazard, 141 U.S. 260 (1890); Phillipine Sugar Estates Development Co., Ltd., v. Government of Phillipine Islands, 247 U.S. 385 (1918); Skelton v. Fed. Surety Co., 15 F. (2d) 756 (C.C.A. 8th 1926). But see, Holmes v. Charlestown Mutual Fire Ins. Co., 10 Met. (Mass.) 211 (1845); Travelers Ins. Co. v. Henderson, 69 Fed. 762 (C.C.A. 8th 1895); 4 Page, Contracts § 2222 (2d ed. 1920).

[3] Malone, Reformation of Writings for Mutual Mistake of Fact, 24 Georgetown L. J. 613, 614 (1936).

ascertainable prior understanding between the parties,[4] (2) a manifest intention that the writing sought to be reformed should express the terms of the prior agreement,[5] and (3) a variance between the agreement and the writing.[6] It should be immaterial that the mistake in the instant case might be viewed as one of law, instead of one of fact.[7] The plaintiff's knowledge of the change should not be controlling in denying reformation, for a unilateral mistake should be sufficient if caused by fraud or inequitable conduct. If the parties intended the writing to embody the former agreement, then the mere variance shows either a mutual mistake, or a unilateral mistake and at least "inequitable conduct."[8] Nor can the carelessness of the defendant's agent in examining the policy be deemed material, once it is decided that literal conformity was contemplated.[9] If, on the other hand, as is implicit in the dissent, the binder agreement was separate from the agreement intended to be embodied in the policy, no reformation should be allowed. Reformation in that case would be a remaking of the contract for the parties, with no prior agreement to guide the court.[10]

Although the usual insurance policy embodies the terms of the binder,[11] that is not necessarily intended in every case, for the binder is designed to afford protection only until the policy is issued.[12] The peculiar facts of the instant case seem to indicate that the parties did not intend strict conformity between the binder and policy, but contemplated further negotiations before concluding final agreement. The submission of a form for the permanent policy by the reinsured, when the reinsurer possessed a copy of the written binder, can hardly be explained on any other ground. Nor can the retention by the reinsurer of an expert for the very purpose of examining these forms be otherwise explained. The court found a custom of the trade occasionally to alter the terms of the binder in the policy and to call attention to those changes only when they were deemed important by the insured. Moreover, since both parties to the transaction were insurance companies, the policy of protecting the untrained is inapplicable.

[4] Columbian National Life Ins. Co. v. Black, 35 F. (2d) 571 (C.C.A. 10th 1929); 3 Williston, Contracts § 1548 (1st ed. 1920); 5 Joyce, Insurance § 3515 (2d ed. 1917).

[5] Abbott, Mistake as a Ground for Affirmative Relief, 23 Harv. L. Rev. 608 (1910).

[6] Leyard v. Hartford Fire Ins. Co., 24 Wis. 496 (1869); Williston, *op. cit. supra* note 4.

[7] This distinction, the result of a mistake by Lord Ellenborough in confusing principles of criminal and civil law, is generally considered to be unsound and is frequently openly repudiated. Snell v. Insurance Co., 98 U.S. 85 (1878); Skelton v. Fed. Surety Co., 15 F. (2d) 756 (C.C.A. 8th 1926); Ireton, Mistake of Law, 67 U.S. L. Rev. 405 (1933); Williston, *op. cit. supra* note 4, at §§ 1581, 1586, 1587; Page, *op. cit. supra* note 2, at § 2214.

[8] Lutensdorfer v. Delphy, 15 Mo. 160 (1851); Malone, *op. cit. supra* note 3, at 618; Page, *op. cit. supra* note 2, at § 2214.

[9] Columbian Nat'l. Life Ins. Co. v. Black, 35 F. (2d) 571 (C.C.A. 10th 1929); Skelton v. Fed. Surety Co., 15 F. (2d) 756 (C.C.A. 8th 1926); 2 Pomeroy, Equity Jurisprudence § 856 (4th ed. 1918); Page, *op. cit. supra* note 2, at § 2219.

[10] Cherry v. Brizzarola, 89 Ark. 309, 116 S.W. 668 (1909); Malone, *op. cit. supra* note 3; Joyce, *op. cit. supra* note 4.

[11] Usually, the binder affords temporary protection on the terms of the policy applied for. 1 Joyce, Insurance § 65 (2d ed. 1917).

[12] Smith & Wallance Co. v. Prussian Nat'l. Ins. Co., 68 N.J. L. 674, 54 Atl. 458 (1903); Mutual Fire Ins. Co. v. Goldstein, 119 Md. 83, 86 Atl. 34 (1912); Vance, Insurance § 66 (2d ed. 1930).

It seems more in accord with the intent of the parties that the binder be considered a temporary contract outlining the nature of the coverage, subject to modification in the final policy, or the two agreements be deemed wholly separate, the binder to lapse when the policy becomes effective. Either of these interpretations should lead to the result reached by the minority.[13]

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International Law—Statute of Limitations—Foreign Sovereign—[Federal].—In answer to an action by the United States government, as assignee of the Soviet government,[1] against the defendant bank for an account established with the defendant by the Imperial Russian government, the defendant pleaded that the New York Statute of Limitations[2] had barred the claim before the assignment. *Held*, that since foreign sovereigns are to be given all the privileges extended to the national sovereign unless such privileges are expressly withheld by the federal government, and since, therefore, the Soviet government would enjoy immunity from the statute of limitations extended to the United States government, its assignee, the United States, could recover. *United States v. Guaranty Trust Co. of New York.*[3]

Though the result of instant case appears proper, it seems hardly justifiable on the basis of the principle of comity. Since the privileges of the national sovereign are based on given reasons, such privileges should be extended to foreign sovereigns only if these same reasons apply. The exemption of the federal government from the statute of limitations has a two-fold basis: the one historical, that the sovereign making the law does not intend to be bound thereby unless it expressly so provides;[4] the other, a modern and more rational explanation, that since any loss caused the national sovereign by the failure of its servants to enforce its claims in time would fall ultimately on the taxpayers, it is preferable not to bar the sovereign at all in such cases.[5] It is evident that neither of these reasons applies as to a foreign sovereign.[6] The Court concluded, however, that the immunity should be extended, as a matter of comity, because courtesy in international relations would not permit a foreign sovereign to "suffer

[13] For an excellent discussion of the problems involved in reformation, see Malone, *op. cit. supra* note 3.

[1] A general assignment, to the United States government, of all claims of the Russian government against American citizens was made under the so-called Litvinoff Pact, an executive agreement recognizing the Soviet government, concluded on November 16, 1933, between President Roosevelt and Foreign Commissar Litvinoff.

[2] New York Civil Practice Act of 1920, Art. 2, §§ 10–61.

[3] 91 F. (2d) 898 (C.C.A. 2d 1937).

[4] See United States v. Hoar, 2 Mason (U.S.) 311, 312–4 (1821); Bacon, A New Abridgment of the Law, Prerogative ,E 5 (1852).

[5] See United States v. Hoar, 2 Mason (U.S.) 311, 313 ff. (1821); Gibson v. Chouteau, 13 Wall., (U.S.) 92, 99 (1871); United States v. Nashville, C. & St. L. Ry. Co., 118 U.S. 120, 125 (1885); 1 Bl. Comm. 247, Story on Agency § 319 (7th ed. 1869).

[6] See Commissioner v. Buckner, 48 Fed. 533, 536 (1891) (*dictum*); also *dictum* to this effect in United States v. Brown, 247 N.Y. 211, 218 ,160 N.E. 13, 16 (1928); Story, J. in United States v. Hoar, 2 Mason (U.S.) 311, 314 (1821); French Republic v. Saratoga Co., 191 U.S. 427, 437 (1903).