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]

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).

from the negligence of its officers and servants."[7] This conclusion, however, does not seem to be required by the normal conception of comity which is defined as the courtesy due foreign sovereigns in order to maintain their dignity and self-respect.[8] Seemingly no question of comity is involved in the instant case, for the dignity of a foreign sovereign should not require it to unload the consequences of its own servants' negligence on the citizens of another country. Comity has never been interpreted as requiring that every privilege of the national sovereign be extended foreign sovereigns. Foreign sovereigns have been held responsible for the negligence of their servants,[9] and, as a general rule, a sovereign, when requesting the assistance of a foreign court, is treated as an ordinary suitor.[10]

The non-applicability of the New York statute of limitations was buttressed by reference to *United States v. Belmont.*[11] Quoting that case, the court said that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." It does not seem unreasonable to assume that any case in which a foreign sovereign is involved, thereby becomes an "international affair," since it cannot be said that a foreign sovereign who avails itself of the convenience of a New York bank is engaging in a private business transaction and ought to bear the same relation to the bank as any ordinary creditor. For it is well established in international law that the public property of a foreign sovereign is immune from execution.[12] Moreover, the application of the state statute of limitations would amount to a confiscation of the sovereign's claim, or at least to its being forced before the foreign courts[13] to defend its claim within

[7] Note Scrutton, L. J.'s statement in The Tervaete, [1922] Prob. Div. 259, 272 that a foreign sovereign coming into our courts must "allow the legal rights we recognize to be effectively enforced against him"; see also Seymour v. Van Slyck, 8 Wendell (N.Y.) 403, 422 (1830), where it was said: "The general principle is adopted that laches are not imputable to the government, and this principle is founded not on the notion of extraordinary prerogative, but upon considerations of public policy."

[8] Hall, International Law 14 n., 70 (8th ed. 1934); 1 Oppenheim, International Law 31, 32 (5th ed. 1937); Stockton, Outline of International Law 4 ff. (1914).

[9] See The Pesaro, 277 Fed. 473 (1921) (*dictum*) and cases therein cited; also The Newbattle 10 Prob. Div. 33 (1885); 1 Oppenheim, International Law 288 (5th ed. 1937); Hall, International Law 268 (8th ed. 1924).

[10] See The Gloria, 286 Fed. 188, 194 ff. (1923); United States v. Nat'l. City Bank of New York, 83 F. (2d) 236, 238 (C.C.A. 2d 1936); King of Spain v. Hullet, and Widder 1 Cl. & F. 332, 352 (1833) and comment in Watkins, The State as a Party Litigant 177 (1927); also Research in International Law, Harvard Law School, Part II, Articles 4 and 14 (1932).

[11] 57 Sup. Ct. 758, 761 (1937), noted 5 Univ. Chi. L. Rev. 280 (1938).

[12] See The Parlement Belge 5 Prob. Div. 197 (1880); Berizzi Brothers v. S.S. Pesaro, 271 U.S. 562 (1926); Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F. (2d) 705 (C.C.A. 2d 1930); The Exchange v. McFaddon, 7 Cranch (U.S.) 116 (1812); Vavasseur v. Krupp, 9 Ch. Div. 351 (1878); Mason v. Intercolonial Ry. of Canada, 179 Mass. 349, 83 N.E. 876 (1908); French Republic v. Board of Supervisors of Jefferson County, 200 Ky. 18, 252 S.W. 124 (1923); 26 Am. J. of Intern. Law. 456 (Supp. 1932).

[13] A sovereign cannot be forced to submit to a foreign court. Oliver American Trading Co. Inc. v. Government of the United States of Mexico, 5 F. (2d) 659 (C.C.A. 2d 1924); French Republic v. Board of Supervisors of Jefferson County, 200 Ky. 18, 252 S.W. 124 (1923);

the statutory period. Since such a situation might create diplomatic difficulties for the federal government—to which any such complaint of the sovereign would be directed—it would be intolerable to permit the application of a state statute of limitations to the foreign government's claim.

Even if the New York statute were applicable, it might be argued that it was never tolled, but was suspended by the Soviet government's disability to sue as long as it was unrecognized in this country.[14] The New York Civil Practice Act[15] enumerates only infancy, insanity and imprisonment as disabilities which can allay the tolling of the statute. But the instant case would fall within a generally accepted exception for cases of absolute impossibility to sue, not contemplated by the legislature.[16] It would be manifestly unjust to reject a claim of the Soviet government for not having sued before when it would have been refused access to the courts of this country had it attempted to sue. Against this, it might be argued that the Russian claim was barred by the running of the statute of limitations as against the recognized Kerensky government[17] to which the original refusal to pay was addressed by the bank. But the principle of the continuity of governments[18] should not be applied against the Soviet government by charging it with the omissions of the Kerensky government, which was then neither the de facto government of Russia nor one with an interest in prosecuting claims on behalf of the Russian state which had passed out of its control.[19]

Practice—Scintilla of Evidence Held Sufficient To Prevent Directed Verdict—[Illinois].—In a wrongful death action, the plaintiff's own witnesses gave unimpeached and uncontradicted testimony that the deceased, while walking on the right side of a straight two lane highway with his back to traffic, stepped diagonally into the center of the highway and, as he bent to pick up an object, was struck by defendant's car. According to the testimony of the plaintiff's witnesses, the defendant was travelling about 50 miles per hour and was but 20 or 25 feet away from the deceased when he stepped into the road. There was little traffic and visibility was excellent. In Illinois, the plaintiff must show, as part of his prima facie case, that the deceased was free from

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Mighell v. Sultan of Johore, [1894] 1 Q.B. 149; 1 Oppenheim, International Law 222 (5th ed. 1937); Wilson and Tucker, International Law 136 (1901); 1 Fauchille, Traité de Droit International Public 270 (8th ed. 1922); F. von Liszt, Das Voelkerrecht 64 (11th ed. 1918); Research in International Law Part III, Art. 7 (1932).

[14] See Russian Soc. Fed. Soviet Rep. v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923); The Penza, 277 Fed. 91 (1921); Republic of China v. Merchant's Fire Assur. Corp. of N.Y., 30 F. (2d) 278 (C.C.A. 9th 1929).

[15] § 60.

[16] Hanger v. Abbott, 6 Wall. (U.S.) 532 (1867) (state of war between contestant's countries suspends statute of limitations); Sands v. Campbell, 31 N.Y. 344 (1865) (an injunction against suit suspends statute of limitations); see Buswell, The Statute of Limitations and Adverse Possession 183 ff. (1889).

[17] Lehigh Valley R. Co. v. State of Russia, 21 F. (2d) 296, 410 (C.C.A. 2d 1927); The Rogdai, 278 Fed. 294 (1920).

[18] The Sapphire, 10 Wall., (U.S.) 164 (1870).

[19] As to the question of the possible revival of outlawed Russian claims through their assignment to the United States government in the executive agreement of 1933, see *supra* p. 9000.