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An Act to Amend the Civil Practice Act in Relation to the Revival of Claims Barred by the Statute of Limitations

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AN ACT TO AMEND THE CIVIL PRACTICE ACT IN RELATION TO THE REVIVAL OF CLAIMS BARRED BY THE STATUTE OF LIMITATIONS. — Statutes of limitation have reference to the periods of time within which actions or proceedings in law or equity must be brought, and which on a failure to do so establish a legal presumption that the obligation involved had been paid or discharged,[1] and in the case of realty that a conveyance had been executed, but lost.[2] It is designed not merely to raise a presumption [3] of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten or has become incapable of explanation by reason of the death or removal of witnesses.[4]

Although it is said that by the common law there were no limitations of actions, nevertheless, pleas of limitation were allowed long before there was any statute on the subject, and limitations of time in criminal and real actions had existed for centuries.[5] Thus, continued adverse possession of real property for a substantial period of time precluded the owner from regaining his land from the possessor. But the common law concept of a limitation of time within which an action must be commenced is entirely distinct from the statutes of limitation as they exist today.[6] "The statutes of limitation . . . are founded in public needs and public policy—are arbitrary enactments by the law-making power." [7] It is generally held that the operation of the statute goes only to the remedy,[8] and does not act to extinguish the right, with an apparent exception noted with respect to specific real and personal property to be hereinafter discussed.

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[1] See 2 COOLEY, CONSTITUTIONAL LIMITATIONS 761 (8th ed. Carrington 1927).

[2] *See* Union Central Life Ins. Co. v. Spinks, 119 Ky. 261, 83 S. W. 615, 616 (1904).

[3] Originally, a statute of limitation was regarded as one of repose and not one of presumption. Subsequently the opposite view was taken by the courts; but the view which seems to prevail today is to the effect that it is a statute of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory or death or removal of witnesses. See 17 R. C. L. 664 (1917).

[4] Bell v. Morrison, 1 Pet. 351, 360 (U. S. 1828).

[5] For some procedural aspects of the statute of limitations and its early common law application and progression, see Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COL. L. REV. 157 (1927).

[6] *Ibid.* By the common law there was no fixed time for the bringing of actions. People v. Gilbert, 18 Johns. 227 (N. Y. 1820). In tort actions, the cause of action abated on the death of either party. This theory of abatement did not extend to actions *ex contractu*. Limitations are created solely by statute, and derive their authority therefrom. They are legislative and not judicial acts. *See* Barnhardt v. Morrison, 178 N. C. 563, 568, 101 S. E. 218, 221 (1919).

[7] Campbell v. Holt, 115 U. S. 620, 628 (1885).

[8] Smith v. Turner, 91 N. H. 198, 17 A. 2d 87 (1940); Evans v. Finley, 166 Ore. 227, 111 P. 2d 833 (1941).

The plea of the statute is not compulsory, being a personal privilege of which a party may avail himself or not as he pleases.[9]

It may be said that statutes of limitation are presumed to be prospective and not retrospective in their operation, in the absence of a clear legislative intent to the contrary, and the presumption is against any intent on the part of the legislature to make such a statute retroactive.[10]

But supposing that the legislature does enact legislation which is in terms retroactive, and such a statute removes the bar of the limitation statute which otherwise would have been a complete defense, is this an unconstitutional deprivation of property within the purview of the Fourteenth Amendment [11] to the Constitution of the United States?

That is the problem to be here considered.

The Leading Case

The leading case on this branch of the subject is *Campbell v. Holt*,[12] wherein the plaintiff sued for the violation of an implied contract to pay money. The cause of action arose prior to the outbreak of the Civil War. The Texas legislature suspended the operation of the statutes of limitation during the war, but thereafter renewed their operation. Subsequent to the time allotted to the plaintiff to commence suit, a new constitution was enacted which contained a saving clause for causes of action such as the plaintiff's. Thereupon plaintiff commenced suit. The defendant insisted that the bar of the statute being complete, it could not be taken away; and that to do so would violate that part of the Fourteenth Amendment to the Constitution of the United States which declares that no state shall ". . . deprive any person of life, liberty, or property, without due process of law . . . ."

The Court made a distinction in principle between suits involving the recovery of tangible property, real and personal, and those in which an in personam claim is made,[13] and held ". . . that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is,

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[9] Sanger v. Nightingale, 122 U. S. 176 (1887).

[10] Hopkins v. Lincoln Trust Co., 233 N. Y. 213, 135 N. E. 267 (1922). See 17 R. C. L. 682 (1917).

[11] U. S. CONST. AMEND. XIV, § 1, the material provision of which states that, ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

[12] 115 U. S. 620 (1885).

[13] The court predicated this distinction on the doctrine of prescription, the latter having its origin in the old English law. This distinction was disapproved in Bussey v. Bishop, 169 Ga. 251, 150 S. E. 78 (1929).

that by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law." [14] The Court then went on to state that the legislature could remove the bar which the statute of limitations attaches to an action on debt, contract, or tort, and could do so arbitrarily. This conclusion was predicated on the principles that (1) the legislature could arbitrarily enact and retract statutes of limitation, (2) that such a statute does not extinguish the debt or obligation involved, but merely precludes enforcement thereof, and (3) that, although the right to bring an action was a property interest, the right to defend a suit by interposing a statutory limitation was not.

A strong dissenting opinion asserted, and with some logic, that the word "property" as utilized in the constitutional sense, embraces all valuable interests which a man may possess outside of himself; and that an immunity from suit is as valuable to the one party as the right to prosecute the suit is to the other.[15]

However, the majority view of this opinion has not been overruled, and has been expressly followed by two subsequent Supreme Court decisions. In *Stewart v. Keyes*,[16] an act of Congress was declared unconstitutional which revived a claim for the recovery of an interest in land barred by the running of the limitation therein applicable; and in a later case [17] involving the Minnesota Blue Sky Law, resurrectionary legislation encompassing no tangible property was held valid.[18]

It would seem that when the period prescribed by the statute has once run, so as to abrogate the remedy which one might have had for the recovery of property in the possession of another, title

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[14] 115 U. S. 620, 623 (1885).

[15] *Id.* at 630.

[16] 295 U. S. 403 (1935). *But cf.* Danzer and Co. v. Gulf and Ship Island R. R., 268 U. S. 633 (1925), where a distinction was pointed out between cases where the limitation affects only the remedy and those which also go to the liability.

[17] Chase Securities Co. v. Donaldson, 325 U. S. 304 (1945), where, in an action for an amount paid for securities not registered under the Blue Sky Law and where the state supreme court had held that the general statute of limitations had not been tolled, and after resurrectionary legislation in effect limited the bar of the statute, defendant was not thereby deprived of property without due process.

[18] But the reasoning of *Campbell v. Holt* has been thought not applicable to claims arising out of statutes containing their own limitation, it being there held that the limitation becomes part of the definition of the right, which is extinguished along with the remedy when the action is barred, and which may not be reinstated consistently with the requirements of due process. Danzer and Co. v. Gulf and Ship Island R. R., 268 U. S. 633 (1925) (Interstate Commerce Act); Link v. Seaboard Air Line R. R., 73 F. 2d 149 (4th Cir. 1934) (wrongful death act); Bussey v. Bishop, 169 Ga. 251, 150 S. E. 78 (1929) (workmen's compensation law).

to the property is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it as the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect so as to disturb this title. It is vested completely and perfectly. Any attempted revival of the claim of the original owner would be confiscatory in character and, therefore, unconstitutional as an unlawful deprivation of property. It would be well to note that in such a case, the statute affects the *res* or claim itself, and not merely the remedy; that is, it actually transfers title to the interest involved. It is submitted that in such a situation, the statute of limitation operates to absolutely extinguish the claim of the original owner, and is not remedial in nature, but rather substantive or in rem.

But when the Court declares that the prerogative to bar the enforcement of a claim through the interposition of the statute of limitations is not a property interest, albeit the claim itself is a vested interest safeguarded by the Constitution, the Court's reasoning would seem to be predicated upon a fallacious premise; that premise being the connotation of "property" as set forth in the Fourteenth Amendment.

The meaning of property in the various ramifications of its application is and has been one of the most perplexing problems of constitutional law. But "property" in its commonly accepted legal sense is no longer an exclusively physical concept. It encompasses all the rights, powers, privileges and immunities arising from possession, ownership or claim to some valuable interest. It would seem therefore, that the Court's distinction between the statute barring only the remedy and not the right is paralogical legal fiction, designed to sanction the view that the defense of the statute of limitations is not a property interest. Certainly a right is of no value if there is no remedy to enforce it. Right and remedy are necessarily correlative and self-complementary. Surely if the right to litigate a claim is property, and if the withdrawing of the remedy to sue on that claim would be unconstitutional, it follows that the option to preclude the enforcement of that claim is, if not just as valuable, at least some form of property interest within the purview of the Federal Constitution.

The view that the defense of the statute of limitations is a proprietary interest has been followed by a majority of jurisdictions in this country.

The General View

There is a divergence of judicial opinion as to whether the legislature may remove a statutory bar to a cause of action on a personal demand where the bar has already become complete. There is no dissent from the doctrine that the bar cannot be removed where a title has been acquired through the operation of the statute of limitations. In most jurisdictions the general rule is laid down, without

exception or qualification, that the legislature cannot remove a statutory bar to a cause of action that has already matured.[19] In a few jurisdictions the distinction between a statutory bar operating to invest persons with title to property and a bar which constitutes merely a defense to a personal demand, initially presented in *Campbell v. Holt,* is followed.[20] The New York law on this subject, to be hereinafter reviewed, would seem to affirm neither the Supreme Court nor the majority rule, but expounds a conciliatory view in that it avoids the hardship of the majority rule and ignores the apparent mathematical logic of the Supreme Court, by declaring that the validity of resurrectionary legislation depends solely on its reasonableness, as applied to the particular set of circumstances before the court.

A number of cases contain general statements to the effect that the legislature cannot remove a bar of limitations which has become complete, the basis of this conclusion being that ". . . the statute of limitation is a rule of property." [21] Thus, an Arkansas court commented, " '. . . after a cause of action has become barred by the statute of limitations, the defendant has a vested right to rely on that statute as a defense, and neither a constitutional convention nor the Legislature has power to divest that right and revive the cause of action.' " [22] In some jurisdictions the running of the statute of limitations absolutely extinguishes the cause of action, it being considered a right as well as a remedy.[23]

However, the better view would seem to be that the statute of limitations encompasses merely procedural characteristics, and the bar created by its having run precludes the remedy, and does not act to extinguish or destroy the claim itself.[24] This would seem to be conclusively established by the fact that unless the statute is affirmatively interposed in defense, its benefit is presumed waived, and the court will thereupon proceed to judgment upon the merits.[25] Were it true that the cause of action was completely nullified by the running of the statute, the court would be unable to litigate a claim

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[19] Wasson v. State *ex rel.* Jackson, 187 Ark. 537, 60 S. W. 2d 1020 (1933); Bussey v. Bishop, 169 Ga. 251, 150 S. E. 78 (1929); McCutcheon & Church v. Smith, 111 Tex. 554, 242 S. W. 454 (1922); *see* Raymer v. Comley Lumber Co., 169 Okla. 576, 38 P. 2d 8, 14 (1934); Cathey v. Weaver, 111 Tex. 515, 242 S. W. 447, 453 (1922).

[20] *See* Berkin v. Healy, 52 Mont. 398, 158 Pac. 1020 (1916).

[21] Raymer v. Comley Lumber Co., 169 Okla. 576, 38 P. 2d 8, 14 (1934).

[22] Wasson v. State, 187 Ark. 537, 60 S. W. 2d 1020 (1933), quoting from 6 R. C. L. 309 (1915); *accord,* McCutcheon & Church v. Smith, 111 Tex. 554, 242 S. W. 454 (1922).

[23] Maryland Casualty Co. v. Beleznay, 245 Wis. 390, 14 N. W. 2d 177 (1944).

[24] King v. Solomon, 323 Mass. 326, 81 N. E. 2d 838 (1948); Johnson v. Railroad Co., 54 N. Y. 416 (1873). *See* Baker v. Cohn, 266 App. Div. 236, 41 N. Y. S. 2d 765 (1st Dep't 1943). See Note, 164 A. L. R. 1387 (1946).

[25] To the effect that the statute of limitations does not nullify a debt, but merely prevents enforcement of recovery, see Note, 8 A. L. R. 2d 640 (1949).

which was in law a nullity.[26] The reasoning heretofore described does not apply to a situation where title to property passes to another upon the running of the statute; and this because the defendant in such a case really sets up superior title derived from the statute of limitations, and not the statute itself.[27]

In Massachusetts the general rule seemed to be against the power of the legislature to remove the bar of the statute of limitations until the case of *Danforth v. Groton Water Company*[28] was decided. In that decision the court in a very hard case declined to hold unconstitutional a statute authorizing petitions for a jury to assess damages for the taking of water rights, enacted after the same was barred by the statute of limitations. The court predicated its conclusion not on *Campbell v. Holt,* but on the theory that in construing the validity of resurrectionary legislation there is a limited degree of latitude within which common notions of justice must predominate as the criterion. It subsequently adhered to this decision, where there was not the excuse of a hard case, in another opinion wherein it upheld a statute allowing a petition against a railroad company for the assessment of damages in relation to raising the grade of a street, such statute having been passed after the claim had been barred by the limitation statute.[29] In the still later case of *Mulligan v. Hilton,*[30] the court discussed at some length the power of the legislature to revive a cause of action barred by the limitation statute, laying down the rules that where the time for prosecuting a cause of action is fixed by contract,[31] or by a statute that made the limitation of time inhere in the right rather than in the remedy,[32] and whereby lapse of time title passes to real or personal property,[33] the bar cannot be constitutionally divested by a statutory revival of the right of action. The court then went on to say that as to the running of the statute against a claim in personam, the legislature could constitutionally revive such a claim, but such a power of revival must be exercised in a restricted but not precisely delimited field. Thus, the statement by Mr. Justice Holmes in the *Groton Water Company* case to the effect that ". . . constitutional rules, like those of the common law, end in a penumbra where the Legislature has a certain freedom in fixing the

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[26] To the effect that no one has a vested right in any given mode of procedure, see Note, 10 A. L. R. 2d 921 (1950), dealing with transfer of action to another tribunal.

[27] See 2 CARMODY ON PRACTICE 662 (2d ed. 1932).

[28] 178 Mass. 472, 59 N. E. 1033 (1901).

[29] Dunbar v. Boston and P. R. R., 181 Mass. 383, 63 N. E. 916 (1902).

[30] 305 Mass. 5, 24 N. E. 2d 676 (1940).

[31] It would be well to note that according to the great weight of authority, and as advocated in *Campbell v. Holt,* the statute of limitation does not inhere in a contract made while the statute is in force.

[32] *See also* Home Ins. Co. v. Dick, 281 U. S. 397 (1930); Danzer and Co. v. Gulf and Ship Island R. R., 268 U. S. 633 (1925).

[33] Thus the court followed the distinction made in *Campbell v. Holt.*

line . . . ," [34] was recognized as at least one criterion in denying or affirming the validity of resurrectionary legislation. This one criterion was adopted and advocated in the case of *Robinson v. Robins Dry Dock and Repair Company* [35] which is the predominating case on this subject in New York.

The New York Ruling

In the case of *Hopkins v. Lincoln Trust Company*,[36] the court pointed out that the power to revive a right of action already barred has been upheld in some jurisdictions, denied or doubted in others, while in this state there are conflicting dicta. Thus, in *Hulbert v. Clark* [37] it was said, arguendo, that the statute does not, after the passing of the prescribed period, discharge the debt, but simply bars the remedy, and that the legislature may repeal the statute and restore the remedy. Subsequently, in a case where a claim was presented against a school district for the refunding of part of school taxes, it was stated that since the defense of the statute of limitations was not property it may be removed by legislative enactment.[38]

In the heretofore mentioned *Robinson* case,[39] the plaintiff's intestate was killed while working as an employee of the defendant. Plaintiff commenced a wrongful death action more than two years after the intestate's death. The defense interposed was the statute of limitations.[40] The plaintiff in reply pleaded that she had applied for an award under the Workmen's Compensation Act, and had procured compensation until October 15, 1920, when the payment of compensation was terminated by order of the commission after the Supreme Court of the United States had rendered a decision [41] that the New York Workmen's Compensation Act did not apply to a person employed in maritime activity as was this plaintiff's intestate. The lower court [42] granted defendant's motion for judgment on the

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[34] 178 Mass. 472, 473, 59 N. E. 1033, 1034 (1901).

[35] 238 N. Y. 271, 144 N. E. 579 (1924).

[36] 233 N. Y. 213, 135 N. E. 267 (1922). "The power thus to revive has been upheld in some jurisdictions (Campbell v. Holt, 115 U. S. 620). In others, it has been denied or doubted (Board of Education v. Blodgett, 155 Ill. 448; Eingartner v. Illinois Steel Co., 103 Wis. 373, 380; Danforth v. Groton Water Co., 178 Mass. 472, 476, 478; Dunbar v. Boston & P. R. R., 181 Mass. 383, 386). In our own state there are conflicting dicta (Hulbert v. Clark, 128 N. Y. 295; House v. Carr, 185 N. Y. 453. *Contra:* Germania Savings Bank v. Village of Suspension Bridge, 159 N. Y. 362, 368)." *Id.* at 215, 139 N. E. at 267.

[37] 128 N. Y. 295, 28 N. E. 638 (1891).

[38] *See* People *ex rel.* Eckerson v. Board of Education, 126 App. Div. 414, 421, 110 N. Y. Supp. 769, 774 (2d Dep't 1908).

[39] See note 35 *supra.*

[40] N. Y. Decedent Estate Law § 130 prescribes a period of two years from the death of the decedent within which the wrongful death action must be commenced.

[41] Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920).

[42] 204 App. Div. 578, 198 N. Y. Supp. 99 (2d Dep't 1923).

pleadings. Subsequent to the time this lower court passed on defendant's motion, the legislature enacted Section 23-a to the Civil Practice Act [43] which was purposed to revive claims such as the plaintiff's. The power to reinstate a right of action already barred was opposed by the defendant, who asserted that such legislation constituted a violation of the due process clause of the Federal Constitution.

Lehman, J., in writing the opinion of the court relied principally on the heretofore considered theory expounded by the tribunals of the State of Massachusetts, but did not expressly reject the holding of *Campbell v. Holt.* He recognized that there was, in construing the validity of resurrectionary legislation, a certain indefinite area of constitutional interpretation wherein the ultimate conclusion of the court was to be premised on either the reasonableness or unreasonableness of the act in question. In observing that the plaintiff promptly asserted the only remedy she possessed,[44] and that she had by unforeseen circumstances, through no fault of her own, been deprived of that remedy,[45] the court found sanction for the action of the legislature. "Here is no arbitrary deprivation by the Legislature of the rights of one party in order to confer a new right upon another party. The Legislature originally gave this plaintiff a right of action . . . . It imposed a bar after the expiration of a period of time during which it was contemplated a plaintiff would have reasonable opportunity to enforce the right of action. The subsequent assertion of power of the Legislature to give an alternative remedy [46] . . . rendered the plaintiff's apparently reasonable opportunity to bring an action within the time limited almost illusory . . . . The extension of the time to bring her action was reasonable and this exercise of the legislative power should not be declared invalid because of a constitutional limitation of doubtful application." [47] It would be well to note that in concluding the court said, "We . . . do not decide that under any other circumstances an attempted exercise of similar power would be valid." [48]

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[43] Laws of N. Y. 1923, c. 392, which extended to persons who, in reliance upon an invalid statute affecting their rights under the Workmen's Compensation Act, lost their right to sue for death of one upon whom they were dependent, and gave those persons the right to thereafter commence such an action at any time within one year after it went into effect. This was operative to take from certain persons a complete defense which they might otherwise have asserted to such an action.

[44] N. Y. Workmen's Compensation Law § 11 provides an exclusive remedy for the employee against the employer; a common law action does not lie except in certain cases not here applicable.

[45] The Supreme Court decision of Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 (1920), precluded the plaintiff from obtaining the award she had timely applied for and recovered.

[46] The court referred to the exclusive remedy provided under N. Y. Workmen's Compensation Law § 11.

[47] 238 N. Y. 271, 280, 144 N. E. 579, 582 (1924).

[48] *Ibid.*

The most recent exposition by the New York courts on this subject is contained in the case of *Gallewski v. Hentz & Co.*[49] Guttman, a resident and citizen of the Netherlands, entered into an agreement with the defendant, a New York brokerage firm, whereby defendant agreed to buy and sell securities for Guttman "upon his instruction and request." During May of 1940 the German army invaded and occupied the Netherlands, and during this occupation Guttman was arrested and deported to a concentration camp in Czechoslovakia. In that same month the defendant, without authority, sold the major portion of the securities held for Guttman's account and, out of the proceeds of such sales, reduced Guttman's indebtedness to it. Guttman's death was established by a court decree in the Netherlands subsequent to the time that the German army was repulsed. In 1946 the plaintiff was appointed ancillary administrator by the Surrogate's Court of New York County, and in March, 1948 (seven years and ten months after the cause of action accrued) plaintiff sued to recover the value of the securities unauthorizedly sold. The defendant interposed the six-year statute of limitations.[50] Pending appeal to the Court of Appeals, Civil Practice Act Section 28-a [51] was enacted, which expressly revived the plaintiff's cause of action.[52] The Court acknowledged the fact that most states hold it beyond the power of the legislature to revive causes of action after the limitation period has expired, regardless of whether the claim was in personam or in rem; but refused to expressly give sanction to that view or the prin-

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[49] 301 N. Y. 164, 93 N. E. 2d 620 (1950).

[50] N. Y. CIV. PRAC. ACT § 48.

[51] Laws of N. Y. 1950, c. 759. The text of the statute is as follows:

"1. *If a person entitled to maintain an action, other than a person entitled to the benefits of section twenty-seven, was a resident of or a sojourner in a foreign country with which the United States or any of its allies were at war during the period beginning September first, nineteen hundred thirty-nine, and ending August fourteenth, nineteen hundred forty-five, or any territory occupied by the government of such foreign country, the period of such residence or sojourn during which such foreign country was so at war with the United States or any of its allies, or during which such territory was so occupied, shall not be a part of the time limited in this article for commencing the action, provided, however, that the time limited for the commencement of such action shall not hereby be extended for more than one year after the effective date of this section.*

"2. This act shall apply to actions heretofore accrued or hereafter accruing and whether or not such actions have heretofore been barred by any statute of limitations, provided, however, that nothing herein contained shall operate to revive a cause of action heretofore barred where such revival would affect an interest in property which has resulted from the expiration of the time heretofore limited by law for the commencement of an action.

"3. This act shall take effect immediately." (Added provision in italics.)

[52] N. Y. Civ. Prac. Act § 28-a, subd. 2, is somewhat confusing in one respect. It purports to apply not only to actions heretofore accrued but also to those "hereafter accruing." It is not understandable how the statute could apply to actions "hereafter accruing" when it concerns only persons residing or sojourning in an enemy country or enemy-occupied territory between September 1, 1939 and August 14, 1945.

ciples recited in *Campbell v. Holt*.[53] Rather it predicated its decision on the *Robinson* case and stated the hardship rule as contained therein: ". . . a revival statute is not necessarily and per se void as a taking of 'property' without due process of law . . . the Legislature may constitutionally revive a personal cause of action where the circumstances are exceptional and are such as to satisfy the court that serious injustice would result to plaintiffs not guilty of any fault if the intention of the Legislature were not effectuated . . . . The tests suggested in the *Robinson* case (*supra*) leave the court free to approach each revival statute on its individual merits, in the light of its own peculiar circumstances and setting." [54] It was then concluded that the unparalleled upheaval of World War II [55] so completely disrupted communications, that residents of occupied territories were completely incapacitated from pursuing and effectuating their rights in the courts of this state.[56] And that this was a case ". . . *where both instinct and reason revolt at the proposition that redress for a wrong must be denied because the Legislature may not remove a statutory bar which has conferred an immunity which is contrary to all prevailing ideas of justice.*" [57] Thus the constitutionality of resurrectionary legislation was again upheld in this state, but with the admonition that it was unnecessary to determine the validity of Section 28-a under diverse circumstances.

The Conclusion

It may be said that there exist three separate opinions on the validity of legislation which purports to revive a claim barred by the statute of limitations.

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[53] 115 U. S. 620 (1885). The proviso at the end of Section 28-a, subd. 2, of the bill was apparently included to conform with the distinction made in *Campbell v. Holt* between the constitutionality of statutes relating to personal causes of action and causes of action affecting an interest in property.

[54] 301 N. Y. 164, 174, 93 N. E. 2d 620, 624 (1950).

[55] THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE COMMITTEE ON STATE LEGISLATION, BULLETIN #6 (1950), at 273, 274, declared, "The bill seems reasonable and desirable. The conditions of global warfare experienced in World War II found many persons who were not enemies of the United States . . . residing . . . in enemy countries or territory occupied by them . . . many of these people were unable to . . . prosecute suits within the prevailing time limitations because they were . . . sojourning in enemy occupied territory . . . some of them were sent to concentration camps. This bill appears to be designed to assure a reasonable opportunity for the commencement of actions on claims those people had which might otherwise be barred by the existing statute of limitations. The purpose of the bill, therefore, appears to be laudable."

[56] Pendency of a state of war constitutes a disability to suitors who are citizens or subjects of hostile powers. Bailey v. Jackson, 16 Johns. 210 (N. Y. 1818).

[57] Gallewski v. Hentz & Co., 301 N. Y. 164, 174, 93 N. E. 2d 620, 624, quoting from the *Robinson* case, note 47 *supra*.

1. There is the majority rule which asserts that once the defense of the statute of limitations has vested, it can never be denied effect. The rationale of this theory is the principle that the statute of limitations is a rule of property, and once vested, it creates a valuable right, the infringement of which is prohibited by the due process clause of the Fourteenth Amendment to the Federal Constitution.[58]

2. There is the Supreme Court view which draws a distinction between a statutory bar operating to invest persons with title to property and a bar which constitutes merely a defense to a personal demand. That distinction is predicated on the effect a statute of limitation has on the interest involved. If it effects a transfer of title to real or personal property, no subsequent legislative enactment can divest that title. If the effect is merely to suspend the remedy, as in claims other than those involving tangible property, all legislative enactments reinstating that remedy are constitutional, and this because that bar is not a valuable property interest within the connotation of the Federal Constitution.

3. There is the New York view which conditions the constitutionality of resurrectionary legislation on the hardship which would be imposed on the plaintiff were the statute denied judicial approval. In taking cognizance of the fact that the in personam effect of limitation statutes do not operate on the right, but merely on the remedy, and in supposing a penumbra of constitutional interpretation wherein no static rules are relevant, but rather wherein circumstances in their varying forms must be utilized in determining the reasonableness of statutory enactments, it is submitted that the New York rationale is a great deal more sound than the previous two theories.[59]

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[58] For collection of cases, see Notes, 133 A. L. R. 384 (1941), 36 A. L. R. 1316 (1925).

[59] THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE COMMITTEE ON STATE LEGISLATION, BULLETIN #6 (1950), at 275, 276, declared, "In New York, the extent of the power to revive a cause of action barred by the statute of limitations is not entirely clear, and revival is an extreme exercise of the legislative power . . . . There are . . . cases . . . which indicate the legislature has certain latitude in dealing with the statute of limitation where there appears to be a moral obligation to do so, the seeming infraction of right is not very great and justice requires relief."