Contents

[Where the current statutory citation and language is given and the source given is the codes of 1877, you may assume that the relevant provision was in effect at all times during the problem on the exam. The statutes are numbered, so that if you have occasion to cite one on the exam, you can cite it by number, e.g., 'A1' for South Dakota Codified Laws § 15-2-1.]

I. Selected South Dakota Statutes

A. Statutes of Limitations

(1) South Dakota Codified Laws § 15-2-1

Commencement of civil actions limited by prescribed periods--Manner of objecting to commencement

Civil actions can only be commenced within the periods prescribed in this title after the cause of action shall have accrued except where in special cases a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited can only be taken by answer or other responsive pleading.

Source: South Dakota Code 1939 & Supp 1960, § 33.0201; Code of Civil Procedure, 1877 § 37.

(2) South Dakota Codified Laws § 15-3-1

Seizin or possession within twenty years required for action to recover real property or possession

No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question within twenty years before the commencement of such action.

Source: South Dakota Code 1939 & Supp 1960, § 33.0217; Code of Civil Procedure, 1877 § 41.

(3) 15-3-2. Seizin or possession within twenty years required for cause of action or defense based on title to real property

No cause of action or defense to an action founded upon the title to real property or to rents or services out of the same, shall be effectual unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in

question within twenty years before the committing of the act in respect to which such action is prosecuted or defense made.

Source: SDC 1939 & Supp 1960, § 33.0218; Code of Civil Procedure, 1877 § 42.

(4) 15-3-3. Limitation of actions based on entry on real estate

No entry upon real estate shall be deemed sufficient or valid as a claim unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued.

Source: SDC 1939 & Supp 1960, § 33.0219; Code of Civil Procedure, 1877 § 43.

(5) 15-3-7. Possession of real property presumed from legal title--Occupation by another presumed subordinate to legal title

In every action for the recovery of real property or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action.

Source: SDC 1939 & Supp 1960, § 33.0220; Code of Civil Procedure, 1877 § 44.

(6) 15-3-9. Possessory right not impaired by descent on death of person in possession

The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

Source: SDC 1939 & Supp 1960, § 33.0226; Code of Civil Procedure, 1877 § 50.

(7) 15-3-10. Twenty years' possession under written instrument or judgment deemed adverse possession--Tract divided into lots

Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises under such claim for twenty years, the premises so included shall be deemed to have been held adversely; except that where the premises so included consist of a tract divided into lots the possession of one lot shall not be deemed a possession of any other lot of the same tract.

Source: SDC 1939 & Supp 1960, § 33.0221; Code of Civil Procedure, 1877 § 45.

(8) 15-3-11. Acts constituting adverse possession based on written instrument or judgment

For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment, or a decree, land shall be deemed to have been possessed and occupied in the following cases:

(1) Where it has been usually cultivated or improved;

(2) Where it has been protected by a substantial inclosure;

(3) Where, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purposes of husbandry, or the ordinary use of the occupant; or

(4) Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining country shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

Source: SDC 1939 & Supp 1960, § 33.0222; Code of Civil Procedure, 1877 § 46.

(9) 15-3-12. Actual occupation required for adverse possession under claim other than written instrument or judgment

Where it shall appear that there has been an actual continued occupation of premises under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment, or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

Source: SDC 1939 & Supp 1960, § 33.0223; Code of Civil Procedure, 1877 § 47.

(10) 15-3-13. Acts constituting adverse possession under claim other than written instrument or judgment

For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, or judgment, or decree, land shall be deemed to have been possessed and occupied in the following cases only:

(1) Where it has been protected by a substantial inclosure; or

(2) Where it has been usually cultivated or improved.

Source: SDC 1939 & Supp 1960, § 33.0224; Code of Civil Procedure, 1877 § 48.

(11) South Dakota Codified Laws § 15-3-14.

Tolling of statute during disability--Time for commencement of action after removal of disability

If a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or service out of the same, be, at the time such title shall first descend or accrue, either:

(1) Within the age of twenty-one years;

(2) Mentally ill; or

(3) Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense for a term less than for life;

the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense; but such action may be commenced, or entry or defense made after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability, but such action shall not be commenced, or entry, or defense made after that period.

Source: SDC 1939 & Supp 1960, § 33.0227; Code of Civil Procedure, 1877 § 51.

(12) 15-3-15. Vesting of title by possession and payment of taxes for ten years under color of title--Continuation of possession and tax payment by successor in interest

Every person in the actual possession of lands or tenements under claim and color of title made in good faith, and who shall have continued for ten successive years in such possession, and shall

also during said time have paid all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his paper title. All persons holding under such possession by purchase, devise, or descent before said ten years shall have expired, and who shall have continued such possession and payment of taxes as aforesaid so as to complete said term of ten years of such possession and payment of taxes, shall be entitled to the benefit of this section.

Source: SDC 1939 & Supp 1960, § 33.0228; first passed in 1891.

B. Property

(1) South Dakota Codified Laws § 43-1-1

Property defined

In this code, the thing of which there may be ownership is called property.

Source: CivC 1877, § 159; CL 1887, § 2675; RCivC 1903, § 182; RC 1919, § 252; SDC 1939, § 51.0201.

(2) South Dakota Codified Laws § 43-1-2

Classes of property

Property is either:

(1) Real or immovable; or

(2) Personal or movable.

Source: CivC 1877, § 162; CL 1887, § 2678; RCivC 1903, § 185; RC 1919, § 255; SDC 1939, § 51.0101

(3) South Dakota Codified Laws § 43-1-3

Real and personal property distinguished

Real or immovable property consists of:

(1) Land;

(2) That which is affixed to land;

(3) That which is incidental or appurtenant to land;

(4) That which is immovable by law.

Every kind of property that is not real is personal.

Source: CivC 1877, §§ 163, 167; CL 1887, §§ 2679, 2683; RCivC 1903, §§ 186, 190; RC 1919, §§ 256, 260; SDC 1939, § 51.0102.

South Dakota Codified Laws § 43

[The arrangement of the following statutes one goes the other way. It starts with selected provisions on estates and future interests from the 1877 Code and then references the current statute. You may assume that, with renumbering and modifications not relevant to the case, these provisions are still in effect and remained so throughout the period with which we are dealing unless the reference describes a change. References to ‘territory’ were, of course, changed to ‘state’ after 1889.]

CHAPTER I.

OWNERS.

(4) § 170. WHO MAY CONVEY.] Any person, whether citizen or alien. may take, hold, and dispose of property, real or personal, within this territory. [SDCL § 43-2-9]

CHAPTER II.

MODIFICATIONS 0F OWNERSHIP.

ARTICLE l – INTERESTS IN PROPERTY.

(5) § 171. OWNERSHIP CLASSED.] The ownership of property is either:

1. Absolute; or,

2. Qualified. [SDCL § 43-2-4]

(6) § 172. ABSOLUTE] The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws. [SDCL § 43-2-5]

(7) § 173. QUALIFIED.] The ownership of property is qualified:

1. When it is shared with one or more persons.

2. When the time of enjoyment is deferred or limited; or,

3. When the use is restricted. [SDCL § 43-2-5]

(8) §174. SOLE OWNERSHIP] The ownership of property by a single person is designated as a sole or several ownership. [SDCL § 43-2-10]

(9) §175, OWNERSHIP OF PROPERTY] The ownership of property by several persons is either:

1. Of joint interests;

2. Of partnership interests; or

3. Of interests in common. [SDCL § 43-2-11]

(10) §176. JOINT TENANCY] A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants. [SDCL § 43-2-12. In 1995, ‘executors’ was changed to ‘personal representatives’ to conform to the Uniform Probate Code. In 1951, the following provisions were added to this section, which are now numbered § 43-2-13 and § 43-2-14:

Any deed, transfer, or assignment of real or personal property from husband to wife or from wife to husband which conveys an interest in the grantor’s lands or personal property and by its terms evinces an intent on the part of the grantor to create a joint tenancy between grantor and grantee shall be held and construed to create such joint tenancy, and any husband and wife who are grantor and grantee in any such deed, transfer, or assignment heretofore given shall hold the property described in such deed, transfer, or assignment as joint tenants.

Any deed, transfer, or assignment of real or personal property to two or more grantees, including any deed in which a grantor is also a grantee, which, by the method of describing such grantees or by the language of the granting habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy.]

(11) § 177. PARTNERSHIP.] A partnership interest is one owned by several persons, in partnership. for partnership purposes. [SDCL § 43-2-15]

(12) § 178. COMMON TENANCY.] An interest in common is one owned by several persons not in joint ownership or partnership. [SDCL § 43-2-16]

(13) § 179. DEFINITION.] Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section 176. [SDCL § 43-2-17]

(14) § 180. COMMENCEMENT AND DURATION.] in respect to the time of enjoyment, an interest in property is either:

1. Present or future; and,

2. Perpetual or limited.

(15) § 181. PRESENT.] A present interest entitles the owner to the immediate possession of the property.

(16) § 182. FUTURE] A future interest entitles the owner to the possession of the property only at a future period. [§§ 181.1, 182, and 183 are now combined in SDCL § 43-3-7]

(17) §183. PERPETUAL] A perpetual interest has a duration equal to that of the property.

(18) § 184. LIMITED.] A limited interest has a duration less than that of the property. [§§ 181.2, 183, and 184 are now combined in SDCL § 43-3-21]

(19) 185. FUTURE ESTATES CLASSED] A future interest is either:

1. Vested; or,

2. Contingent. [SDCL § 43-3-9]

(20) § 186. WHEN THEY VEST] A future interest is vested when there is a person in being who would have a right defeasible or indefensible to the immediate possession of the property. upon the ceasing of the intermediate or precedent interest. [SDCL § 43-3-10]

(21) § 187. HOW CONTINGENT.] A future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain. [SDCL § 43-3-11]

(22) § 188. ALTERNATIVE CONTINGENCIES.] Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it and take effect accordingly. [SDCL § 43-3-13]

(23) § 189. NOT VOID.] A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect. [SDCL § 43-3-12]

(24) § 190. POSTHUMOUS HEIR.] When a future interest is limited to successors, heirs, issue or children posthumous children are entitled to take in the same manner as if living at the death of their parent. [SDCL § 43-3-13. In 2007, the words after ‘manner’ were altered to read “if the child was conceived prior to the decedent’s death, was born within ten months of the decedent’s death, and survived one hundred twenty hours or more after birth.”]

(25) § 191. FUTURE ESTATES PASS.] Future interests pass by succession, will, and transfer, in the same manner present interests. [SDCL § 43-3-20]

(26) § 192. POSSIBILITIES.] A mere possibility, such the expectancy of an heir-apparent, is not to be deemed an interest of any kind. [SDCL § 43-3-6]

ARTICLE II.——CONDITION 0F OWNERSHIP.

(27) § 196. CONDITIONS DEFINED] The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition. [SDCL § 43-3-1]

(28) § 197. CLASSED.] Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right. [SDCL § 43-3-2]

(29) § 198. ILLEGAL CONDITIONS VOID] If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void, and the right cannot exist. If it requires the performance of an act not wrong of itself, but otherwise unlawful, the instrument takes effect, and the condition is void. [SDCL § 43-3-3]

(30) § 199. MARRIAGE LIMITATIONS.] Conditions imposing restraints upon marriage, except upon the marriage of a minor, or, of the widow of the person by whom! the condition is imposed, are void; but this does not affect limitations where the intent was not to forbid marriage. but only to give the use until marriage. [SDCL § 43-3-4. In 1919, 'widow' was changed to 'spouse' to be consistent with the S.D. version of the Married Women's Property Act.]

(31) § 200. RESTRAINT ON ALIENATION.] Conditions restraining alienation, when repugnant to the interest created, are void. [SDCL § 43-3-5]

ARTICLE III.—RESTRAINTS UPON ALIENATION.

(32) §201. EXTENT OR LEGAL LIMIT.] The absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in section two hundred and twenty-nine. [SDCL § 43-5-1. The statute was amended in 1983 to add a term in gross of 30 years after lives in being. See also § 43-5-8, adopted in 1983, which says "The common-law rule against perpetuities is not in force in this state."]

[The statute cross-referenced in § 201 follows:]

(33) § 229. REMAINDER IN FEE] A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined, before they attain majority. [SDCL § 43-9-5]

(34) §202. FUTURE LIMITATION VOID.] Every future interest is void in its creation, which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. [§43-5.2. But see § 43-5-8, adopted in 1983, which says "The common-law rule against perpetuities is not in force in this state."]

CHAPTER IV.

TERMINATION 0F OWNERSHIP.

(35) § 211. SUCCESSION DEFEATS CONTINGENCY.] A future interest, depending on the contingency of the death of any person without successors, heirs, issue, or children, is defeated by the birth of a posthumous child of such person, capable of taking by succession. [SDCL § 43-3-16. In 2007, the following was added: "if the child was conceived prior to the decedent's

death, was born within ten months of the decedent's death, and survived one hundred twenty hours or more after birth."]

(36) § 212. FUTURE INTEREST DEFEATED.] A future interest may be defeated in any manner, or by any act or means, which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest thus liable to be defeated, to be on that ground adjudged void in its creation. [SDCL § 43-3-17]

(37) §213. WHEN NOT.] No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger, or otherwise, except as provided by the next section, or where a forfeiture is impose by statute as a penalty for the violation thereof. [SDCL § 43-3-18]

(38) § 214. SAME] No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period. [SDCL § 43-3-18]

(39) § 43-31-13. Possession and occupancy of homestead--Surviving spouse--Minor children

Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife the children may continue to possess and occupy the whole homestead until the youngest child becomes of age.

Source: SL 1874-5, ch 37, § 15; PolC 1877, ch 38, § 15; CL 1887, § 2463; RPolC 1903, § 3231; RC 1919, § 466; SDC 1939, § 51.1716.

[There is a large amount South Dakota authority on homestead, because homesteads are protected against most creditors. This protection is embodied in S.D. Const. Art. 21, § 4. You may assume that the following language from the 1877 Political Code ch. 38 § 6 and § 3 were, insofar as relevant, in effect throughout the entire period: "The homestead must embrace the house used as a home by the owner thereof, and if he or she has two or more houses thus used at different times and places, such owner may select which he or she will retain as a homestead." (§ 6). "A conveyance or incumbrance by the owner of such homestead, shall be of no validity unless the husband and wife, if the owner is married, and both husband and wife are residents of the territory, concur in and sign the same joint instrument." (§ 3). The current version of § 3 reads as follows:]

(40) § 43-31-17. Execution by husband and wife necessary for conveyance or encumbrance--Exception for prisoner of war or missing in action

A conveyance or encumbrance of a homestead by its owner, if married and both husband and wife are residents of this state, is valid if both husband and wife concur in and sign or execute such conveyance or encumbrance either by joint instrument or by separate instruments. However, for the sole purpose of a spouse of a person in the armed forces making application for a home loan under 38 U.S.C. 1701, et seq., the signature of the spouse alone is sufficient to convey or encumber the homestead if the person in the armed forces is officially declared to be: missing in action, captured in line of duty by a hostile force, or forcibly detained or interned in line of duty by a foreign government or power.

Source: SL 1874-5, ch 51, § 3; PolC 1877, ch 38, § 3; CL 1887, § 2451; SL 1891, ch 77, § 1; RPolC 1903, §§ 3217, 3219; RC 1919, § 451; SL 1921, ch 255; SDC 1939, § 51.1703; SL 1972, ch 234; SL 1983, ch 13, § 24.

C. Married Women's Property and Tenancy by the Entireties

[The Field Code of 1877 had for its time quite extensive provisions empowering married women to deal with their property as if they were single. These provisions were strengthened around the turn of the century. For this problem you may assume that all times any married woman could deal with her property and contract as if she were single.]

[The Field Code of 1877 made no mention of tenancy by the entireties. In Schimke v. Karlstad, 87 S.D. 349, 208 N.W.2d 710 (1973), the Supreme Court of South Dakota held that the tenancy by the entireties did not exist and never had existed in South Dakota.]

D. Statute of Frauds

(1) South Dakota Codified Laws § 53-8-2

Contracts required to be in writing--Statute of frauds.

The following contracts are not enforceable by action unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or his agent, as authorized in writing:

(1) An agreement that by its terms is not to be performed within a year from the making thereof;

(2) An agreement made upon consideration of marriage, other than a mutual promise to marry;

(3) An agreement for sale of real estate or an interest therein, or lease of the same, for a period longer than one year. However, this does not abridge the power of any court to compel specific performance of any agreement for sale of real estate in case of part performance thereof; and

(4) An agreement for a loan of money or for an extension of credit, which agreement may be enforced by a beneficiary for whom the agreement was made, including, but not limited to, vendors of agricultural goods, services or products. A loan or an extension of credit made pursuant to § 51A-12-12 or chapter 54-11 is specifically exempt from the provisions of this section.

Source: CivC 1877, §§ 920, 993; CL 1887, §§ 3544, 3617; RCivC 1903, §§ 1238, 1311; RC 1919, §§ 855, 856; SDC 1939, § 10.0605; SL 1985, ch 381.

[South Dakota does not have any general statute about the form of deeds to real estate. What authority there is on parole (oral) grants or informal deeds of land applies § 53–8–2(3) and the general Anglo-American common law on the topic.]

E. Recording and Marketable Title

[South Dakota has a recording system, of the 'pure notice' type. It also has a Marketable Title Act, first passed in 1947, which would probably require the recording of any outstanding future interests in the land within 23 years of the time when the marketability of the title was to be determined. Otherwise, the title would be 'marketable' without the future interest and a purchaser for valuable consideration would take free of the future interest. You may also assume

(though in fact this is not necessarily the case) that the Marketable Title Act has no effect on donative transactions.]

F. Succession and Probate

[You may assume that with various renumberings and with changes not relevant to this case, the following provisions of the Field Code of 1877 remained in effect until the adoption of the Uniform Probate Code in 1995.]

(1) § 778. ORDER OF, TO PROPERTY NOT WILLED.], When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the probate code, subject to the payment Of his debts, in the following manner:

1. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leave a surviving husband or wife, and more than one children , or one child living, and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

2. If the decedent leave no issue, the estate goes in equal shares to the surviving husband, or wife, and to the decedent's father. If there be no father, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother, or sister, by right of representation; if he leave a mother also, she takes an equal share with the brothers and sisters. If decedent leave no issue, nor husband, nor wife, the estate must go to the father.

3. If there be no issue, nor husband nor wife, nor father nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother, or sister, by right of representation; if a mother survive, she takes an equal share with the brothers and sisters.

(2) § 779. ABOLISHED.] Dower and courtesy are abolished.

[Note: You may also assume that any will in the problem which is described as having been probated complied with the procedural provisions of the Probate Code that were in effect at the time.]

G. Charitable Trusts

(1) South Dakota Codified Laws § 55-9-1. Express trusts--Creation for charitable, educational, religious, or other public use

Express trusts of real or personal property, or both, may be created to receive by grant, devise, gift, or bequest, and to take charge of, invest and administer in accordance with the terms of the trust, upon and for any charitable, benevolent, educational, religious or other public use or trust.

Source: SL 1955, ch 429, § 1; SDC Supp 1960, § 59.0601.

(2) South Dakota Codified Laws § 55-9-2. Validity of trust not affected by uncertainty or violation of rule against perpetuities--Disposal of property by trustee

No such trust shall be invalid because of indefiniteness or uncertainty of the object of such trust or of the beneficiaries thereof designated in the instrument creating the same nor by reason of the same contravening any statute or rule against perpetuities, but no such trust shall be construed so as to prevent or limit the free alienation of the title to any of the trust estate by the trustee in the administration of said trust, except as may be permitted under existing or subsequent statutes.

Source: SL 1955, ch 429, § 2; SDC Supp 1960, § 59.0602.

[Charitable corporations were specifically authorized in the Field Code of 1877. Statutory provisions about charitable trusts in S. Dak. do not seem to antedate 1955. The current provisions are contained in SDCL § 55-9, the first two provisions of which are given above. Section 55-9-4 incorporates the cy pres doctrine, and it is clear that that doctrine is alive and well in S. Dak. See *In re* Reese Trust, 776 N.W.2d 832 (S. Dak. 2009). Reproduced below is a case, *In re* McNair's Estate, 74 S.D. 369, 53 N.W.2d 210 (1952), that antedates the statute and at least arguably involves the a charitable trust allowed to stand as a common-law matter.]

H. Zoning

(1) South Dakota Codified Laws § 11-4-1. Regulatory powers of municipality

For the purpose of promoting health, safety, or the general welfare of the community the governing body of any municipality may regulate and restrict the height, number of stories, and size of buildings and other structures; the percentage of lot that may be occupied; the size of the yards, courts, and other open spaces; the density of population; and the location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes. A municipality may enter into an agreement with any landowner specifying the conditions under which the landowner's property may be developed.

Source: SDC 1939, § 45.2601; SL 1974, ch 111; SL 1982, ch 55, § 2; SL 2000, ch 69, § 53; SL 2004, ch 102, § 1.

[As you can see, except for the last sentence, this language tracks that of the Standard State Zoning Enabling Act. The last sentence was added in 2004. You can assume that the rest of the statute tracks the Standard State Zoning Enabling Act. The specifics can be found on Westlaw.]

[City of Sioux Falls v. Cleveland, 75 S.D. 548, 70 N.W.2d 62 (1955) is the only S. Dak. case that mentions prior nonconforming uses in so many words and that in a quotation from McQuillen on Municipal Corporations. An examination, however, of the S. Dak. cases on zoning and planning makes clear that the concept of prior nonconforming uses is alive and well in S. Dak.]

II. Cases

Ex parte CROW DOG

Supreme Court of the United States
109 U.S. 556 (1883)

MATTHEWS, J., delivered the opinion of the Court.

The petitioner is in the custody of the Marshal of the United States for the Territory of Dakota, imprisoned in the jail of Lawrence County, in the First Judicial District of that territory, under sentence of death, adjudged against him by the district court for that district, to be carried into execution January 14, 1884. That judgment was rendered upon a conviction for the murder of an

Indian of the Brule Sioux band of the Sioux nation of Indians by the name of Sin-ta-ge-le-Scka, or in English, Spotted Tail, the prisoner also being an Indian of the same band and nation, and the homicide having occurred, as alleged in the indictment, in the Indian country, within a place and district of country under the exclusive jurisdiction of the United States and within the said judicial district. The judgment was affirmed on a writ of error by the supreme court of the territory. It is claimed on behalf of the prisoner that the crime charged against him and of which he stands convicted is not an offense under the laws of the United States; that the district court had no jurisdiction to try him, and that its judgment and sentence are void. It therefore prays for a writ of habeas corpus, that he may be delivered from an imprisonment which he asserts to be illegal.

The indictment is framed upon section 5339 of the Revised Statutes. That section is found in title LXX, on the subject of crimes against the United States, and in chapter three, which treats of crimes arising within the maritime and territorial jurisdiction of the United States. It provides that

"Every person who commits murder, . . . within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, . . . shall suffer death."

Title XXVIII of the Revised Statutes relates to Indians, and the subtitle of chapter four is "Government of Indian Country." It embraces many provisions regulating the subject of intercourse and trade with the Indians in the Indian country, and imposes penalties and punishments for various violations of them. Section 2142 provides for the punishment of assaults with deadly weapons and intent, by Indians upon white persons, and by white persons upon Indians; section 2143, for the case of arson, in like cases, and section 2144 provides that "The general laws of the United States defining and prescribing punishments for forgery and depredations upon the mails shall extend to the Indian country." The next two sections are as follows:

"SEC. 2145. Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

"SEC. 2146. The preceding section shall not be construed to extend to [crimes committed by one Indian against the person or property of another Indian, nor to] any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where by treaty stipulations the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

That part of section 2146 placed within brackets was in the Act of 27th March, 1854, c. 26, § 3, 10 Stat. 270, was omitted by the revisers in the original revision, and restored by the act of 18th February, 1875, c. 80, 18 Stat. 318, and now appears in the second edition of the Revised Statutes. It is assumed for the purposes of this opinion that the omission in the original revision was inadvertent, and that the restoration evinces no other intent on the part of Congress than that the provision should be considered as in force without interruption, and not a new enactment of it for any other purpose than to correct the error of the revision.

The district courts of the Territory of Dakota are invested with the same jurisdiction in all cases arising under the laws of the United States as is vested in the circuit and district courts of the United States. Rev.Stat. §§ 1907-1910. The reservation of the Sioux Indians, lying within the exterior boundaries of the Territory of Dakota, was defined by Art. II of the treaty concluded April 29, 1868, 15 Stat. 635, and by § 1839 Rev.Stat., it is excepted out of and constitutes no part of that territory. The object of this exception is stated to be to exclude the jurisdiction of any state or territorial government over Indians within its exterior lines without their consent where their rights have been reserved and remain unextinguished by treaty. But the district courts of the territory having, by law, the jurisdiction of district and circuit courts of the United States, may, in that character, take cognizance of offenses against the laws of the United States, although committed within an Indian reservation, when the latter is situate within the space which is constituted by the authority of the territorial government the judicial district of such court. If the land reserved for the exclusive occupancy of Indians lies outside the exterior boundaries of any organized territorial government, it would require an act of Congress to attach it to a judicial district, of which there are many instances, the latest being the Act of January 6, 1883, by which a part of the Indian territory was attached to the District of Kansas and a part of the Northern District of Texas. 22 Stat. 400. In the present case, the Sioux reservation is within the geographical limits of the Territory of Dakota, and being excepted out of it only in respect to the territorial government, the district court of that territory within the geographical boundaries of whose district it lies may exercise jurisdiction under the laws of the United States over offenses made punishable by them committed within its limits. *United States v. Dawson,* 15 How. 467; *United States v. Jackalow,* 1 Black 484; *United States v. Rogers,* 4 How. 567; *United States v. Alberty,* Hempst. 444, opinion by Mr. Justice Daniel; *United States v. Starr,* Hempst. 469; *United States v. Ta-wan-ga-ca,* Hempst. 304.

The district court has two distinct jurisdictions. As a territorial court, it administers the local law of the territorial government; as invested by act of Congress with jurisdiction to administer the laws of the United States, it has all the authority of circuit and district courts, so that in the former character it may try a prisoner for murder committed in the territory proper, under the local law, which requires the jury to determine whether the punishment shall be death or imprisonment for life, Laws of Dakota 1883, c. 9, and, in the other character, try another for a murder committed within the Indian reservation under a law of the United States which imposes, in case of conviction, the penalty of death.

Section 2145 of the Revised Statutes extends the general laws of the United States as to the punishment of crimes committed in any place within their sole and exclusive jurisdiction except the District of Columbia to the Indian country, and it becomes necessary, therefore, to inquire whether the locality of the homicide for which the prisoner was convicted of murder is within that description.

The first section of the Indian Intercourse Act of June 30, 1834, defines the Indian country as follows:

“That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana or the Territory of Arkansas, and also that part of the United States east of the Mississippi River not within any state, to which the Indian title has not been extinguished, for the purposes of this act, be taken and be deemed to be the Indian country.”

Since the passage of that act, great changes have taken place by the acquisition of new territory, by the creation of new states, and by the organization of territorial governments, and the Revised Statutes, while retaining the substance of many important provisions of the act of 1834, with amendments and additions since made regulating intercourse with the Indian tribes, has nevertheless omitted all definition of what now must be taken to be "the Indian country." Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force. Bramwell, L.J. in *Attorney General v. Lamplough*, 3 Ex.D. 223-227; Hardcastle on Statutory Law 217; *Bank for Savings v. Collector*, 3 Wall. 495 70 U. S. 513; *Commonwealth v. Bailey*, 13 Allen 541. This rule was applied in reference to the very question now under consideration in *Bates v. Clark*, 95 U. S. 204, decided at the October term, 1877. It was said in that case by MR. JUSTICE MILLER, delivering the opinion of the Court, that

"It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title in the absence of any different provision by treaty or by act of Congress."

In our opinion, that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction by treaty or by statute at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of Congress over it under the constitutional power to regulate commerce with the Indian tribes and under any treaty made in pursuance of it. *United States v. McBratney*, 104 U. S. 621.

This definition, though not now expressed in the Revised Statutes, is implied in all those provisions, most of which were originally connected with it when first enacted and which still refer to it. It would be otherwise impossible to explain these references, or give effect to many of the most important provisions of existing legislation for the government of Indian country.

It follows that the *locus in quo* of the alleged offense is within Indian country over which, territorially, the district court of the First Judicial District of Dakota, sitting with the authority of a circuit court of the United States, had jurisdiction.

But if § 2145 Rev.Stat., extends the act of Congress, § 5339, punishing murder, to the locality of the prisoner's offense, § 2146 expressly excepts from its operation "crimes committed by one Indian against the person or property of another Indian," an exception which includes the case of the prisoner and which, if it is effective and in force, makes his conviction illegal and void. This brings us at once to the main question of jurisdiction, deemed by Congress to be of such importance to the prisoner and the public as to justify a special appropriation for the payment of

the expenses incurred on his behalf in presenting it for decision in this proceeding to this Court. 22 Stat. 624, c. 143, March 3, 1883.

The argument in support of the jurisdiction and conviction is that the exception contained in § 2146 Rev.Stat. is repealed by the operation and legal effect of the treaty with the different tribes of the Sioux Indians of April 29, 1868, 15 Stat. 635, and an Act of Congress, approved February 28, 1877, to ratify an agreement with certain bands of the Sioux Indians, &c., 19 Stat. 254.

The following provisions of the treaty of 1868 are relied on:

"ARTICLE I. From this time forward, all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it."

"If bad men among the whites or among other people subject to the authority of the United States shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States and also reimburse the injured person for the loss sustained."

"If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws. And in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no one sustaining loss while violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor."

The second article defines the reservation, which, it is stipulated, is

"set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them, and the United States now solemnly agrees that no person except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article. . . ."

"ARTICLE V. The United States agrees that the agent for said Indians shall in future make his home at the agency building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under their treaty stipulations, as also for the faithful discharge of other duties enjoined upon him by law. In all cases of depredation on person or property, he shall cause evidence to be taken in writing and forwarded, together with

his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty."

Other provisions of this treaty are intended to encourage the settlement of individuals and families upon separate agricultural reservations, and the education of children in schools to be established. The condition of the tribe, in point of civilization, is illustrated by stipulations on the part of the Indians that they will not interfere with the construction of railroads on the plains or over their reservation, nor attack persons at home or traveling, nor disturb wagon trains, mules, or cattle belonging to the people of the United States, nor capture nor carry off white women or children from the settlements, nor kill nor scalp white men, nor attempt to do them harm.

By the Indian Appropriation Act of August 15, 1876, Congress appropriated $1,000,000 for the subsistence of the Sioux Indians in accordance with the treaty of 1868, and "for purposes of their civilization," 19 Stat. 192, but coupled it with certain conditions relative to a cession of a portion of the reservation, and with the proviso

"That no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States which is calculated and designed to enable said Indians to become self-supporting."

In pursuance of that provision, the agreement was made, which was ratified in part by the Act of Congress of February 28, 1877. The enactment of this agreement by statute, instead of its ratification as a treaty, was in pursuance of the policy which had been declared for the first time in a proviso to the Indian Appropriation Act of March 3, 1871, 16 Stat. 566 c. 120, and permanently adopted in § 2079 of the Revised Statutes, that thereafter

"no Indian nation or tribe within the Territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty,"

but without invalidating or impairing the obligation of subsisting treaties.

The instrument in which the agreement was embodied was signed by the commissioners on the part of the United States and by the representative chiefs and head men of the various Sioux tribes, but with certain exceptions on the part of some of the latter, and consisted of eleven articles.

The first defines the boundaries of the reservation; the second provides for wagon roads through it to the country lying west of it, and for the free navigation of the Mississippi River; the third for the places where annuities shall be received.

Article four was as follows:

"The government of the United States and the said Indians being mutually desirous that the latter shall be located in a country where they may eventually become self-supporting and acquire the arts of civilized life, it is therefore agreed that the said Indians shall select a delegation of five or more chiefs and principal men from each band who shall, without delay, visit the Indian territory, under the guidance and protection of suitable persons, to be appointed for that purpose by the Department of the Interior, with a view to selecting therein a permanent home for the said

Indians. If such delegation shall make a selection which shall be satisfactory to themselves, the people whom they represent, and to the United States, then the said Indians agree that they will remove to the country so selected within one year from this date. And the said Indians do further agree in all things to submit themselves to such beneficent plans as the government may provide for them in the selection of a country suitable for a permanent home where they may live like white men."

The fifth article recites that in consideration of the foregoing cession of territory and rights, the United States agrees

"to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868,"

to provide subsistence, etc.

ARTICLE 8 is as follows:

"The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home, and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."

"ARTICLE. 9. The Indians, parties to this agreement, do hereby solemnly pledge themselves, individually and collectively, to observe each and all of the stipulations herein contained; to select allotments of land as soon as possible after their removal to their permanent home, and to use their best efforts to learn to cultivate the same. And they do solemnly pledge themselves that they will at all times maintain peace with the citizens and government of the United States; that they will observe the laws thereof, and loyally endeavor to fulfill all the obligations assumed by them under the treaty of 1868 and the present agreement, and to this end will, whenever requested by the President of the United States, select so many suitable men from each band to cooperate with him in maintaining order and peace on the reservation as the President may deem necessary, who shall receive such compensation for their services as Congress may provide."

By the 11th and last article, it was provided that the term "reservation," as therein used, should be held to apply to any country which should be selected under the authority of the United States as their future home.

The 4th article and part of the 6th article of the agreement, which referred to the removal of the Indians to the Indian territory, were omitted from its ratification, not having been agreed to by the Indians.

If this legislation has the effect contended for to support the conviction in the present case, it also makes punishable, when committed within the Indian country by one Indian against the person or property of another Indian, the following offenses, defined by the general laws of the United States as to crimes committed in places within their exclusive jurisdiction, *viz.*, Manslaughter, § 5341; attempt to commit murder or manslaughter, § 5342; rape, § 5345; mayhem, § 5348; bigamy, § 5352; larceny, § 5356, and receiving stolen goods, § 5357. That this legislation could constitutionally be extended to embrace Indians in the Indian country, by the mere force of a

treaty, whenever it operates of itself, without the aid of any legislative provision was decided by this Court in the case of *United States v. 43 Gallons of Whisky*, 93 U. S. 188. *See* *Holden v. Joy*, 17 Wall. 211; *The Cherokee Tobacco*, 11 Wall. 616. It becomes necessary, therefore, to examine the particular provisions that are supposed to work this result.

The first of these is contained in the first article of the treaty of 1868, that

"If bad men among the Indians shall commit a wrong or depredation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws."

But it is quite clear from the context that this does not cover the present case of an alleged wrong committed by one Indian upon the person of another of the same tribe. The provision must be construed with its counterpart, just preceding it, which provides for the punishment by the United States of any bad men among the whites, or among other people subject to their authority, who shall commit any wrong upon the person or property of the Indians. Here are two parties, among whom respectively there may be individuals guilty of a wrong against one of the other -- one is the party of whites and their allies, the other is the tribe of Indians with whom the treaty is made. In each case, the guilty party is to be tried and punished by the United States, and in case the offender is one of the Indians who are parties to the treaty, the agreement is that he shall be delivered up. In case of refusal, deduction is to be made from the annuities payable to the tribe, for compensation to the injured person, a provision which points quite distinctly to the conclusion that the injured person cannot himself be one of the same tribe. Similar provisions for the extradition of criminals are to be found in most of the treaties with Indian tribes as far back, at least, as that concluded at Hopewell with the Cherokees, November 28, 1785, 7 Stat. 18.

The second of these provisions that are supposed to justify the jurisdiction asserted in the present case is the eighth article of the agreement, embodied in the act of 1877, in which it is declared:

"And Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."

It is equally clear, in our opinion, that these words can have no such effect as that claimed for them. The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government by appropriate legislation thereafter to be framed and enacted necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life which it was the very purpose of all these arrangements to introduce and naturalize among them was the highest and best of all -- that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. They were nevertheless to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards, subject to a guardian -- not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor, and by education, it was hoped might become a self-supporting and self-governed society.

The laws to which they were declared to be subject were the laws then existing, and which applied to them as Indians, and, of course, included the very statute under consideration, which excepted from the operation of the general laws of the United States, otherwise applicable, the very case of the prisoner. Declaring them subject to the laws made them so, if it effected any change in their situation, only in respect to laws in force and as existing, and did not effect any change in the laws themselves. The phrase cannot, we think, have any more extensive meaning than an acknowledgement of their allegiance, as Indians, to the laws of the United States made or to be made in the exercise of legislative authority over them as such. The corresponding obligation of protection on the part of the government is immediately connected with it in the declaration that each individual shall be protected in his rights of property, person, and life, and that obligation was to be fulfilled by the enforcement of the laws then existing appropriate to those objects, and by that future appropriate legislation which was promised to secure to them an orderly government. The expressions contained in these clauses must be taken in connection with the entire scheme of the agreement as framed, including those parts not finally adopted, as throwing light on the meaning of the remainder, and looking at the purpose, so clearly disclosed in that, of the removal of the whole body of the Sioux nation to the Indian territory proper, which was not consented to, it is manifest that the provisions had reference to their establishment as a people upon a defined reservation as a permanent home, who were to be urged, as far as it could successfully be done, into the practice of agriculture, and whose children were to be taught the arts and industry of civilized life, and that it was no part of the design to treat the individuals as separately responsible and amenable, in all their personal and domestic relations with each other, to the general laws of the United States outside of those which were enacted expressly with reference to them as members of an Indian tribe.

It must be remembered that the question before us is whether the express letter of § 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed. If not, it is in force and applies to the present case. The treaty of 1868 and the agreement and act of Congress of 1877, it is admitted, do not repeal it by any express words. What we have said is sufficient at least to show that they do not work a repeal by necessary implication. A meaning can be given to the legislation in question which the words will bear, which is not unreasonable, which is not inconsistent with its scope and apparent purposes, whereby the whole may be made to stand. Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old. *Wood v. United States,* 16 Pet. 342; *Daviess v. Fairbairn,* 3 How. 636; *United States v. Tynen,* 11 Wall. 88; *State v. Stoll,* 17 Wall. 425.

The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *generalia specialibus non derogant.* "The general principle to be applied," said Bovill, C.J., in *Thorpe v. Adams,* L.R. 6 C.P. 135,

"to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together."

"And the reason is," said Wood V.C., in *Fitzgerald v. Champneys,* 30 L.J.N.S.Eq. 782, 2 Johns. & Hem. 31-54,

"that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intent, by a general enactment afterwards, to derogate from its own act when it makes no special mention of its intention so to do."

The nature and circumstances of this case strongly reinforce this rule of interpretation in its present application. It is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law. It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality. It is a case, too, of first impression, so far as we are advised, for if the question has been mooted heretofore in any courts of the United States, the jurisdiction has never before been practically asserted as in the present instance. The provisions now contained in §§ 2145 and 2146 of the Revised Statutes were first enacted in § 25 of the Indian Intercourse act of 1834. 4 Stat. 733. Prior to that, by the act of 1796, 1 Stat. 469, and the act of 1802, 2 Stat. 139, offenses committed by Indians against white persons, and by white persons against Indians, were specifically enumerated and defined, and those by Indians against each other were left to be dealt with by each tribe for itself according to its local customs. The policy of the government in that respect has been uniform. As was said by MR. JUSTICE MILLER, delivering the opinion of the Court in *United States v. Joseph*, 94 U. S. 614, 94 U. S. 617:

"The tribes for whom the act of 1854 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized state or territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals."

To give to the clauses in the treaty of 1868 and the agreement of 1877 effect so as to uphold the jurisdiction exercised in this case would be to reverse in this instance the general policy of the government toward the Indians, as declared in many statutes and treaties and recognized in many decisions of this Court from the beginning to the present time. To justify such a departure in such a case requires a clear expression of the intention of Congress, and that we have not been able to find.

It results that the First District Court of Dakota was without jurisdiction to find or try the indictment against the prisoner; that the conviction and sentence are void, and that his imprisonment is illegal.

The writs of habeas corpus and certiorari prayed for will accordingly be issued.

_In re_ McNAIR'S ESTATE
Supreme Court of South Dakota
74 S.D. 369, 53 N.W.2d 210 (1952)

Proceeding in the matter of the estate of Ella McNair, deceased. Clarence Kip Richardson was appointed administrator with the will annexed, and he filed his final account and petition for distribution. The account was settled and decree of distribution was entered in county court, and Estella Farrington and others appealed. The Circuit Court, Beadle County, Charles S. Hanson, J., rendered decision interpreting the will and Estella Farrington and others appealed. The Supreme Court, Sickel, P. J., held that devise of property to trustee who was to retain and manage it for 10 years when it was to be transferred to college and used in aid of needy students was not violative of rule against perpetuities.

Judgment reversed and cause remanded with directions.

SICKEL, P. J.

The olographic will of Ella McNair was admitted to probate in Beadle county and Clarence Kip Richardson was appointed administrator with the will annexed. His final account and petition for distribution was filed, and after hearing the account was settled and decree of distribution was entered in the county court. From these orders an appeal was taken to the circuit court by the heirs of testatrix. The only question decided by the circuit court was the interpretation of paragraph XIV of the will, and it is from that decision that the heirs have appealed to this court.

Paragraph XIV of the will reads as follows: 'I give, devise and bequeath unto George E. Longstaff (not Royl & Longstaff) as trustee and in trust the following properties and all the rest and remainder thereof. The trustee is to hold the same, pay taxes and repairs thereon and pay to Cecil Richardson $1000 each year from the net proceeds and to hold the remainder in trust for ten years when it may be paid to said Cecil Richardson, if he is living and if not, it may be turned to Huron College to found a scholarship fund for needy worthy ambitious students. This to be known as the J D McNair scholarship fund.' Then follows a description of the property affected by the above paragraph of the will. A photographic copy of the above paragraph is set forth in Re McNair Estate, 72 S.D. 604, 38 N.W.2d 449, 452.

The circuit court decided: 'Cecil Richardson, named in Paragraph XIV of the Will, died fourteen days before Ella McNair departed this life. His death before hers eliminates and nullifies the provisions of the Will for him, whether they were valid or invalid. But the elimination of the provisions in Paragraph XIV for Cecil does not destroy the fourteenth paragraph or leave the balance of Paragraph XIV without effect.

The provisions of Paragraph XIV for Cecil can be eliminated without doing violence to the general testamentary scheme or plan expressed by Ella McNair in this paragraph; and with the ineffectual provisions for Cecil eliminated, this paragraph of the Will devises and bequeaths all the rest and remainder of her estate, including the property therein described as well as any other of her property not previously disposed of, to Huron College to found the J. D. McNair scholarship fund for 'needy, worthy, ambitious students.'

Appellants contend that 'the error here consisted in the finding that the concededly intended attempted but illegal trust may be eliminated, and by such elimination automatically converted into a general residuary clause, for the reason that when such intended trust is eliminated it leaves nothing, and it is clear from the language voiced by the decedent that she intended no

residuary clause and intended to dispose of the income only from the properties for a ten-year period, and had not intended that Cecil Richardson should have any part of the Principal of such properties and intended that Huron College should have nothing except what Cecil would receive, if he did not survive the ten-year period'.

The first consideration is the contention of appellants that the trust for Cecil Richardson created a perpetuity and suspension of the power of alienation as to the property described therein and that it is void under SDC 51.0231, 51.0232 and 51.0417, and appellants' further contention that when such trust is eliminated paragraph XIV is ineffectual for any purpose and the property described in that paragraph of the will passes to the heirs at law as property not disposed of by the will.

The bequest to Cecil Richardson was placed in trust for a term of ten years after the death of testatrix, and was postponed until the expiration of the term. It was contingent on the possible death of Cecil Richardson before the expiration of the term. If Cecil Richardson should live until the end of the term he would receive the entire bequest contained in paragraph XIV of the will and Huron College would take nothing. The bequest to Huron College was also postponed until the expiration of the ten-year term and it was contingent on the probability or possibility that the life of Cecil Richardson might extend beyond the end of that term. According to the will, if Cecil Richardson should die before the expiration of the term the future interest of Huron College could not vest in anyone, and the power of alienating the property would be suspended, from the date of death until the expiration of the term and this would violate the rule against perpetuities. 41 Am.Jur., Perpetuties and Restraints on Alienation, § 3. The death of Cecil Richardson did occur before the expiration of the ten-year term and respondents concede that the bequest to Huron College cannot be sustained if the devise to Cecil Richardson is to be considered.

It conclusively appears from the evidence that Cecil Richardson died fourteen days before the death of the testatrix and respondents contend that this event extinguished the trust in his favor. SDC 59.0215. The fact of suspension and postponement, or the term thereof, is determined with reference to the circumstances existing at the time the will took effect. 48 C.J., Perpetuities, § 112; 70 C.J.S., Perpetuities, § 45f. The above text in Corpus Juris Secundum states the rule as follows: 'Where a person by whose life a suspension or postponement is attempted to be measured is dead when the instrument takes effect, the limitation is to be read as if it contained no provision for suspension or postponement during such life; and so, where a will according to its terms would create a suspension for an excessive period, but before the death of the testator one or more of the measuring lives has expired, the limitation is not invalid if the remaining provisions do not create an illegal suspension.'

The application of the above rule is demonstrated in the case of Tallman v. Tallman, 3 Misc. 465, 23 N.Y.S. 734, 738. There the will devised a life estate to the wife of testator, and the remainder to the two children of an adopted daughter on condition that the survivor of the two daughters marry and have issue, otherwise to the residuary legatees. The death of the wife occurred before that of the testator. The residuary legatees claimed that the devise suspended the power of alienation for more than two lives in being and therefore violated the rule against perpetuities. The court said: 'But the will speaks as of the time of the testator's death, and whatever might have been the effect, had Maria E. Tallman, his wife survived him, matters not, as by her death before him the legacies and devises to her lapsed, and are not to be considered in estimating the terms within which alienation is restrained, or the absolute ownership suspended. The death of the testator's wife before his death leaves it as if she had not been named in the will.' By the death of Cecil Richardson before that of testator the devise to him lapsed, and the

part of paragraph XIV relating to that devise is not to be considered in the interpretation of the will.

Respondents contend that 'Paragraph XIV is a residuary clause; it is a disposition of all that part of the estate not theretofore disposed of. The language 'all the rest and remainder thereof' is appropriate language for disposing of the residue of the estate.' This interpretation of the will would give to Huron College all the property specifically described in paragraph XIV with the net income thereof and all other property belonging to testatrix at the time of her death but not otherwise disposed of by a specific bequest or devise, and the circuit court so held.

The property devised to Longstaff, as trustee, by paragraph XIV is 'the following properties and all the rest and remainder thereof'. A particular description of the 'following properties' is made a part of that paragraph of the will. The description consists of seventeen tracts of farm and town property, notes with the names of the makers, bonds, bank deposits and savings bonds. The respondents' interpretation of this clause is in effect a substitution of the words 'my estate' for 'thereof'. They reconstruct the clause to read 'the following properties and all the rest and remainder of my estate'. 'Thereof', as here used means of the properties previously designated, that is, of those properties described in paragraph XIV of the will.

Both sides dwell upon the word 'remainder' as used in the clause now being considered. Testatrix was here drafting the Longstaff trust. She first made the bequest to Longstaff as trustee, then she identified the property upon which the trust was to operate. Apparently she considered some additional phrase or expression necessary or appropriate to show her intention to dispose of her entire interest in the designated properties and for that purpose added the phrase 'and the rest and remainder thereof'. The word 'remainder' as here used could have no other significance.

The next clause of paragraph XIV of the will empowers the trustee to hold the properties, 'pay taxes and repairs thereon and pay to Cecil Richardson $1000 each year from the net proceeds . . . '. From this language it appears that the testatrix intended the trustee to hold the property, collect the rents and profits and pay the expenses.

The testatrix then continues 'and to hold the remainder in trust for ten years . . . '. 'A remainder is a remnant of an estate in land, depending upon a particular prior estate created at the same time and by the same instrument and limited to arise immediately on the determination of that estate and not in abridgement of it.' 21 C.J., Estates, § 130; 31 C.J.S., Estates, § 68; 4 Kent Comm. p. 197. Here the prior estate is the Longstaff trust in all the property described in paragraph XIV of the will and the net income thereof. The first remnant was to be the Cecil Richardson devise, limited to arise immediately on the determination of the Longstaff trust. This was the remainder contingent upon the life of Cecil Richardson and which lapsed because the remainderman died before the will went into effect. Then came the devise to Huron College as the remnant of the Longstaff trust, also limited to arise on the determination of the Longstaff trust. As we see it paragraph XIV of the will is an effectual devise of the specific property described therein. It disposed of the remainder of the Longstaff trust but did not dispose of the residue of the estate of testatrix.

In appellants' reply brief they say: 'It is clear that in no event was there any intention on the part of the deceased that Huron College was to be a beneficiary. The beneficiaries were "needy, worthy, ambitious students", and 'Huron College is not designated as a trustee to make the selection . . . '. On this premise they contend that the trust is absolutely void.

That the devise to Huron College to 'found a scholarship fund for needy worthy ambitious students' is a charitable use cannot be doubted. In the case of Vidal v. Girard's Executors, 2

How. 127, 43 U.S. 127, 11 L.Ed. 205, 231, the opinion of Justice Story says: 'Not only are charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars'. These uses are regarded by the courts 'as present interests, vested in the charitable institution, and consequently not within the scope of the rule' against perpetuities. 48 C.J., Perpetuities, §§ 21, 78, 70 C.J.S., Perpetuities, §§ 2, 30.

On the subject of charitable gifts Gray on Perpetuities, Third Edition, says: '§ 590. As has been shown, the natural meaning of 'a perpetuity' is 'an inalienable indestructible interest.' In this sense charitable trusts are perpetuities. And this is no arbitrary doctrine, but arises from the nature of such trusts. For while, generally, a trust is not good unless there be a natural or artificial cestui que trust, charitable trusts are an exception. They are recognized as valid, but yet they do not ordinarily have any definite cestuis que trust. They are therefore inalienable, because there is no one to alienate them. No one has any alienable rights, because no one has any rights. § 591. But the Rule against Perpetuities is not directed at preventing the alienation of present interests, but against the creation of remote future interests. Now while it is true that the nature of charitable trusts makes them inalienable, and therefore perpetuities, in the natural sense of that term, it is by no means a necessary incident of charitable trusts that they should be allowed to begin in the remote future; or, in other words that they should be exempt from the operation of the Rule against Perpetuities. The law may have exempted them, but such exemption is not involved in the conception of a charity.' The question of indefiniteness therefore presents no problem under the rule against perpetuities so far as the trust for charitable purposes is concerned. A problem of remoteness arises out of the fact that the devise is first to Longstaff, trustee, for a term of ten years and then to Huron College.

Gray on Perpetuities, § 607, says on the subject of remoteness: 'If the Court, however, can see an intention to make an unconditional gift to charity (and the Court is very keen-sighted to discover this intention), then the gift will be regarded as immediate, not subject to any condition precedent, and therefore not within the scope of the Rule against Perpetuities'.

Ingraham v. Ingraham, 169 Ill. 432, 48 N.E. 561, 564, 566, 568, 49 N.E. 320, was an action brought for the construction of a will and to set it aside as null and void. The devise in question was to trustees to retain, manage, control and invest it, pay expenses of management of the trust until the fund should equal $100,000 and then cause it to be used for the erection and maintenance of a hospital and 'that said hospital shall provide for the poor and the needy, as far as it may be possible to do so, without charge' or 'with the least possible cost'. It was claimed that this devise violated the rule against perpetuities. As the court stated it the question to determine was whether or not the devise was 'a present and immediate estate, or does it depend for its existence upon the occurrence of some future event, which may not happen within a life or lives in being, ...' In a well considered opinion the court reached this conclusion: 'The immediate and unconditional devotion of a fund to charity, and not the time or manner of its application or administration, is the test of the validity of its creation.' Applying the above rules to the facts the court said: 'Here the fund goes at once and directly to the trustees, for the benefit of the hospital; and no intermediate estate is created, to be enjoyed by any donee or devisee, between the testator's death and the application of the fund to charity. There is no gift prior to the gift to the hospital, and no first taker having precedence over the hospital. The enjoyment or application of the fund is not postponed to await the expiration of any antecedent estate. Charity

takes the fund immediately, and awaits only the period of accumulation before it may enjoy that which is presently given.'

Here the trust property is to be retained and managed by a trustee for a term of ten years, and then transferred to Huron College and to be then used in aid of needy, worthy, ambitious students. The devise is unconditional. No intermediate estate was created for anyone between the testatrix' death and the time for the application of the property to charity. There was no gift of any interest in the property or the income thereof prior to that of the college, and consequently there was no first taker having preference over the college. The application of the property to charity was not postponed to await the expiration of an antecedent estate. Therefore the property vests in the college immediately, and the privilege of adapting it to charitable use awaits the expiration of the ten-year term.

The judgment is reversed and the cause is remanded with directions to modify the judgment in conformity with the views herein expressed.

All the Judges concur.

THE END