

TUESDAY, APRIL 22, 2008
9:00 A.M.

NO. 1

#24580

MARVIN E. TRIPP and DONNA
TRIPP DE SCHEPPER, a/k/a DONNA
DE SCHEPPER,
Plaintiffs and Appellants,

vs.

F & K ASSAM FAMILY, LLC, a South
Dakota limited liability company;
SAMUEL R. ASSAM and LORI R. DEWITT,
As Co-trustees of the Assam Credit
Trust Established under the Fred Assam
Revocable Inter Vivos Trust Agreement
dated July 29, 1987, as amended, SAMUEL
R. ASSAM. Trustee of the Kay Assam Trust,
Defendants and Appellees,

and

VIOLA LAPE, MARQUITA CHAVEZ and
RITA R. CHAVEZ, JOHN T. LAPE a/k/a
JOHN LAPE and JANET C. LAPE, CITY OF
SIOUX FALLS, SOUTH DAKOTA, a municipal
corporation, THE ILLINOIS CENTRAL RAILROAD
COMPANY, f/k/a ILLINOIS CENTRAL GULF
RAILROAD COMPANY, THE UNKNOWN HEIRS,
DEVISEES, LEGATEES, EXECUTORS, ADMINISTRATORS
or CREDITORS OF H.C. ALDRICH, Deceased,
and all persons unknown who have or claim
to have interest of Estate in or lien
or encumbrance upon the premises described
in the Complaint,
Defendants.

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(FOR APPELLEES F & K
ASSAM FAMILY, LLC,
SAMUEL R. ASSAM &
LORI R. DEWITT)

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(FOR APPELLEES F & K
ASSAM FAMILY, LLC,
SAMUEL R. ASSAM &
LORI R. DEWITT)

The Honorable Kathleen K. Caldwell
Second Judicial Circuit
Minnehaha County

(CIV 01-3158)

1. A deed dated January 31, 1888, conveyed a parcel of land described in metes and bounds, but the description did not close and so did not describe a bounded parcel. Absent any testimony about the intent of the parties in 1888, the circuit court reformed the deed by rewriting nearly all of its dimensions and two of its directions, rather than changing one of the four directions, which would have closed the description. Was the court's "reformation" an abuse of discretion?

The circuit court reformed the deed without discussion of the proposed alternative change, without discussion of the evidence supporting its reformation, and without discussion whether reformation was necessary or appropriate to resolve the case. (App. at 10-13.)

Northwestern National Bank v. Brandon, 88 S.D. 453, 221 N.W.2d 12
Garber v. Haskins, 84 S.D. 459, 172 N.W.2d 721 (1969)
Vermilyea v. BDL Enterprises, Inc., 462 N.W.2d 885 (S.D. 1990)

2. The prevailing party claimed title to a disputed strip of land through the deed dated January 31, 1888, which was in his chain of title after a conveyance in 1984. The defect in the 1888 deed was not discovered until 2000, but, by statute, a buyer has constructive notice of the contents of all recorded instruments. Did the ten-year statute of limitation applicable to actions for reformation of a deed begin to run in 1984?

The circuit court held that the statute of limitation began to run only upon actual knowledge of the defect in the deed. (App. at 10-13.)

Burke v. Bubbers, 342 N.W.2d 18 (S.D. 1984)
Fullerton Lumber Co. v. Tinker, 22 S.D. 427, 118 N.W. 700 (S.D. 1908)
Lunstra v. Centruy 21 GKR-Lammers Realtors, 442 N.W.2d 448 (S.D. 1989)
SDCL § 43-28-15

3. The undisputed facts established that for more than 20 years, Tripp cultivated, improved, and substantially enclosed the 33-foot strip. The circuit court did not consider whether these facts established adverse possession, but instead held that the 33-foot strip could not be adversely possessed based on language related to public use in the deed it reformed. Is Tripp the rightful owner of the property by adverse possession?

The circuit court held that the reformed deed precluded the 33-foot strip from being adversely possessed, but did not decide whether the facts otherwise were sufficient to establish adverse possession. (App. at 2-3.)

Lewis v. Aslesen, 2001 S.D. 131, 635 N.W.2d 744

Schultz v. Dew, 1997 S.D. 72, 564 N.W.2d 320

4. This Court has held, like a majority of other courts, that a deed conveying property for a right of way conveys only an easement, but this Court has also held that a warranty deed containing language of a conveyance in fee to a railroad conveys fee title. The Aldrich deed was captioned "Right of Way Deed," and conveyed property for all purposes connected with the construction and operation of a railroad. Did the deed convey only an easement?

The circuit court held that the deed conveyed fee title to the railroad. (App. at 2.)

Northwest Realty Co. v. Jacobs, 273 N.W.2d 141 (S.D. 1978)

Meyerink v. Northwestern Public Service Co., 391 N.W.2d 180 (S.D. 1986)

Tibbitts v. Anthem Holdings Corp., 2005 S.D. 26, 694 N.W.2d 41