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deposit in the trust account. We believe the equitable remedy is to place the remaining money in the existing pre-need trust account, give Quail Creek all existing records which document the pre-need sales, and allow Quail Creek to withdraw the money as it renders services. And unlike the district court, we conclude that the money should not revert to Bruce no matter how much time has passed. Accordingly, we affirm the district court's judgment as modified by this opinion.

AFFIRMED AS MODIFIED.

PAUL OBERMILLER AND BETTY LOU OBERMILLER, HUSBAND AND WIFE, APPELLEES, V. GARY BAASCH AND DENNIS BAASCH, APPELLANTS.

823 N.W.2d 162

Filed October 26, 2012. No. S-11-1042.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Injunction: Equity.** An action for injunction sounds in equity.
3. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
4. **Vendor and Vendee: Words and Phrases.** A merchantable title is a title which a person of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser.
5. **Waters: Boundaries: Title.** Title to riparian lands runs to the thread of the contiguous stream.
6. **Waters: Boundaries: Words and Phrases.** The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow.
7. **Waters: Boundaries: Title.** Where title to an island bounded by the waters of a nonnavigable stream is in one owner and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland.
8. **Waters: Words and Phrases.** The thread of a stream is that portion of a waterway which would be the last to dry up.
9. **Trespass: Title.** To bring an action in trespass, the complaining party must have had title to or legal possession of the land when the acts complained of were committed.
10. **Trespass: Liability.** Liability for trespass exists if an actor intentionally enters land in the possession of another, or causes a thing or third person to do so.

11. **Trespass.** A trespass can be committed on, above, or beneath the surface of the land.
12. **Injunction: Equity.** Where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and that injury will be prevented by injunction. In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.

Appeal from the District Court for Howard County: KARIN L. NOAKES, Judge. Affirmed.

Patrick J. Nelson, of Law Office of Patrick J. Nelson, L.L.C., for appellants.

Roger G. Steele and Liana Steele, of Steele Law Office, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF THE CASE

This appeal, filed by brothers Gary Baasch and Dennis Baasch, the appellants, concerns disputed land located in Howard County, Nebraska, in and near the Middle Loup River. After a bench trial, the district court for Howard County denied Gary Baasch's counterclaim for quiet title. The district court found that husband and wife Paul Obermiller and Betty Lou Obermiller, the appellees, owned all the land they claimed to own, that the fence constructed by the appellants was on the appellees' land, and that Gary Baasch does not own any of the disputed land. The court found that the appellants had trespassed and ordered the appellants to remove the fence and enjoined them from blocking access to the land owned by the appellees. Gary Baasch and Dennis Baasch appeal. Although our reasoning differs from that of the district court, we affirm.

STATEMENT OF FACTS

To summarize, this case involves entitlement to land in the Middle Loup River and whether there was a trespass thereon

by nonowners warranting an injunction. The appellees filed a trespass action occasioned by the appellants' putting up a fence on certain accreted land contiguous to the appellants' property and sought injunctive relief. However, due to the comprehensive relief sought by Gary Baasch, an appellant, in his counterclaim, the case was tried initially as a quiet title action, and after resolution of the ownership issue, the court considered the trespass claim and whether the appellees were entitled to injunctive relief.

The appellees allege they own part of an island referred to as "Lot 9" on island No. 1 and claim ownership of land that has accreted thereto on the east and south sides of Lot 9 down to the centerline of the remaining channel or stream to the south. In this case, the channel to the south is sometimes referred to as the "slough." Over time, the channel to the south has narrowed and produced accreted land. The main body of the Middle Loup River runs roughly west to east on the north side of Lot 9. The appellees claimed that the appellants had built a fence and otherwise trespassed on the appellees' property. Throughout this case, it appears that the appellees have maintained that they are entitled to land north of the centerline of the slough and that Gary Baasch is entitled to accretion south of the centerline of the slough.

Gary Baasch, an appellant, owns land on the mainland which is located to the south of Lot 9 and south of the slough; he claims ownership of all the accretion. Gary Baasch alleged that due to a defect in title concerning Lot 9, the appellees were not entitled to accretion to Lot 9, and sought to quiet title to the accretion in his name. For completeness, we note that Gary Baasch suggests on appeal that the evidence at trial would show that he is also entitled to Lot 9, but there is no allegation or claim to this effect in the controlling pleadings, and in view of the evidence and our disposition, we reject this assertion, as did the district court.

The property at issue on appeal is located in and near the Middle Loup River in the southwest quarter of Section 22, Township 13 North, Range 11 of the 6th P.M., Howard County. According to a survey conducted by Timothy Aitken in February 2010, the land at issue is composed of two

contiguous areas of land. One area, Lot 9, is historically said to consist of approximately 27 acres, although some land has been eroded. The other area is to the east and south of Lot 9 and consists of land which has accreted to Lot 9 and is located north of the centerline of the slough. These two areas were depicted and described on an exhibit attached to the complaint. After trial, the district court quieted title in these two areas in the appellees and incorporated this description in its judgment.

In his answer and counterclaim, Gary Baasch alleged, inter alia, that the appellants did not own Lot 9 and that he owned the accretion thereto. In their answer to the counterclaim, the appellees alleged that they owned Lot 9 and certain accretion thereto and denied that Gary Baasch owned their property and accretion thereto.

The record indicates that when Lot 9 was originally platted, it was part of an island in the Middle Loup River surrounded by a channel to the north and a channel to the south. The south channel separated the island, including Lot 9, from the mainland to the south of the island. Gary Baasch claims ownership of Lot 5 on the mainland situated to the south side of the island, and the record contains no challenge to his claim of ownership of Lot 5.

Aerial maps and testimony indicate that over time, the channel to the south of Lot 9 has narrowed and, as noted above, is now what the parties refer to as the "slough." Witnesses for all parties testified that water from the slough still empties into the Middle Loup River. Because of the narrowing of the south channel, land now exists between Lot 9 and Lot 5 which was not evident on some earlier surveys. Lot 9, as well as accretion thereto north of the centerline of the slough, is the land at issue on appeal. It seems there is no dispute that the accretion was not platted by the U.S. government, and it appears from the record that no one pays taxes on this land. At trial, all parties testified that they have used the accretion for recreational purposes and have granted permission to others to use the property.

The record contains numerous recorded documents regarding the title to Lot 9. Although the record does not contain

evidence showing that Lot 9 was conveyed to a private individual by the U.S. government, the evidence shows that in 1894, Robert Harvey, a surveyor, surveyed the area and designated Lot 9 as part of an island. Harvey indicated that the eastern part of the island, Lot 9, was in Section 22 and was an approximately 27-acre tract.

A certified land patent from the U.S. Bureau of Land Management, dated May 25, 1885, indicates that Johan Nordquist was the owner of Lot 4 in the southwest quarter of the northwest quarter of Section 22. Lot 4 lies north of Lot 9 and is located on the mainland on the north side of the Middle Loup River. In April 1904, Johan Nordquist and his wife, Carolina Nordquist, quitclaimed any interest they had in Lot 9 to Alex Sandberg by a handwritten document. By a handwritten quitclaim deed dated September 12, 1904, Alex Sandberg and Lizzie Sandberg conveyed their interest in Lot 9 on island No. 1 in Section 22 to Anna Carolina Granlund. By a warranty deed filed October 12, 1923, Anna Granlund conveyed her interest in Lot 9 on island No. 1 in Section 22 to Albin Granlund. The language of this warranty deed indicated that it is intended as a conveyance of the land.

On April 20, 1973, Paul Obermiller purchased Lot 9 at public auction from the heirs of Albin Granlund. Paul Obermiller received a quitclaim deed from the Granlund heirs filed July 2, 1973, and an executor's quit claim deed on behalf of the estate of William Granlund, filed July 2, 1973. Dennis Baasch testified that he was present at the auction and further testified that he did not dispute that Paul Obermiller purchased Lot 9 at the auction. On March 6, 1995, Paul Obermiller conveyed his interest in Lot 9 to himself and his wife, Betty Lou Obermiller, by a joint tenancy warranty deed.

In 1974, the appellees installed a trailer on Lot 9 and have maintained it since then. They have also maintained roads and trails on Lot 9, paid taxes on Lot 9, and used Lot 9 for recreational purposes. From 1973 to 2009, Dennis Baasch and his family rented Lot 9 from the appellees for grazing cattle.

In 2008, the appellants hired Casey Sherlock, the Hall County surveyor, to conduct a retracement survey of the survey done by Harvey in 1894 to determine the boundary line

between Gary Baasch's property and the appellees' property. Sherlock testified that a retracement survey is the retracement of an existing survey performed by another surveyor and that it is the duty of a retracement surveyor to locate on the ground the boundary lines and corners established by the original survey.

The Sherlock survey is dated December 31, 2008, and shows a 27.73-acre tract, which is the retracement of Lot 9 surveyed by Harvey. Rather than treating the 27.73 acres as Lot 9, the Sherlock survey labels the 27.73 acre tract as "Accretion" to Lot 5 and under the "Legal Description" states:

> A tract of land being part of accretion to Gov't Lot Five (5) located in the West Half of Section 22, Township Thirteen (13) North, Range Eleven (11) West of the Sixth Principal Meridian, Howard County, Nebraska, also referred to as Lot No. 9 by Robert Harvey on a survey dated January 29, 30, and 31, 1894, said tract being more particularly described as follows . . . .

The Sherlock survey indicates that Lot 5 is located to the south of the 27.73-acre tract. The Sherlock survey also labeled the accreted land as "Accretion." Sherlock did not survey Lot 5.

In April 2009, members of the Baasch family claiming to own all the accreted land informed Paul Obermiller that they intended to install a fence on the accreted land along the eastern boundary of the 27.73 acres identified in the Sherlock survey. Paul Obermiller objected. Nevertheless, in May 2009, the appellants installed the fence. The fence blocked access to some roads and trails that the appellees used to access the land contiguous to Lot 9 which had been created by accretion.

In the fall of 2009, the appellees hired Aitken, a Howard County surveyor and a senior surveyor with Olsson Associates, to survey the land the appellees claimed to own. The Aitken survey, dated February 25, 2010, depicts an area of land with the Middle Loup River as the northern boundary and the centerline of the slough as the southern boundary. This area of land is composed of Lot 9 and the accretion thereto north of the centerline of the slough. The Aitken survey also shows a line indicating the fence installed by the appellants. This survey is attached to the amended complaint. A later Aitken

survey, dated June 2010, shows the survey line for Lot 9 and states that Lot 9 is approximately 27 acres. Another Aitken survey, also dated June 2010, shows the accretion to the east and south of Lot 9. The Aitken survey attached to the amended complaint depicts the totality of the land which is claimed by the appellees, namely Lot 9 and the accretion thereto north of the centerline of the slough.

On February 26, 2010, the appellees filed their amended complaint and alleged that the fence constructed by the appellants was installed on their property and that the installation was a trespass, invasion, and encroachment on their land. The appellees sought injunctive relief and damages.

In their amended answer and counterclaim filed June 21, 2010, the appellants denied the trespass claim, and Gary Baasch alleged a counterclaim seeking quiet title to the accretion. Gary Baasch alleged that the accreted land cannot be owned by the appellees because the appellees are not the legal owners of Lot 9. Gary Baasch further alleged that he owns Lot 5 and that by virtue of this ownership interest, he also owns the accretion because such land has accreted to Lot 5.

After a trial, the district court entered its judgment on November 2, 2011. The court first analyzed the quiet title claim and determined that the appellees are the legal owners of Lot 9 and that they were entitled to the accretion lying north of the centerline of the slough because it is accretion to Lot 9. Therefore, the court rejected Gary Baasch's claim for quiet title and quieted title in the appellees to the land composed of Lot 9 and the accretion thereto "north of the centerline of the slough." In its judgment, the court incorporated by reference the legal description found on the February 2010 Aitken survey and proposed by the appellees and attached to their amended complaint. This award of land is challenged by the appellants on appeal.

In making its determination, as a preliminary matter, the court rejected the argument that any of the parties owned the accreted land at issue by adverse possession, because no party could prove exclusive possession of the property.

In determining that the appellees are the legal owners of Lot 9, the district court cited *United States v. Fullard-Leo*,

331 U.S. 256, 67 S. Ct. 1287, 91 L. Ed. 1474 (1947), for its application of the theory of the "lost grant." The district court explained that the theory of the lost grant

> recognizes that lapse of time may cure the neglect or failure to secure the proper muniments of title to government land, even though the lost grant may not have been in fact executed. In order for this doctrine to be applicable, the possession must be under a claim of right, actual, open and exclusive.

The district court stated "the presumption of a lost grant to land is an appropriate means to quiet long possession." The district court noted although the government had the authority to convey Lot 9, there are no patents or other documents suggesting that the government did so. However, the court went on to state "the property [Lot 9] has been possessed and transferred to private individuals for over a century without objection from the government or anyone else." The court reasoned that because the appellees purchased their interest in Lot 9 at a public auction in 1973 and their possession has been actual, open, and exclusive since that time, the appellees are the equitable owners of Lot 9, and that, applying Nebraska law, the appellees own the contiguous accretion north of the centerline of the slough.

Because the district court found that the appellees are the owners of Lot 9 and also the owners of the identified accretion thereto, the court found that the appellants' installation of the fence on this property was a trespass on the appellees' land. The court ordered the appellants to remove the fence and enjoined them from blocking or denying access to the appellees' property. The court denied the appellees' request for monetary damages, stating that it was not supported by the evidence.

The appellants appealed.

ASSIGNMENTS OF ERROR

The appellants assign, restated and rephrased, that the district court erred when it (1) determined that the appellees own the approximately 27-acre area known as Lot 9 and the accretion thereto north of the centerline of the slough and

(2) determined that the appellants' installation of the fence is a trespass on the appellees' land, entitling the appellees to an injunction.

STANDARDS OF REVIEW

[1] A quiet title action sounds in equity. *Newman v. Liebig*, 282 Neb. 609, 810 N.W.2d 408 (2011).

[2] An action for injunction sounds in equity. *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012).

[3] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011).

ANALYSIS

The appellants claim that the district court erred when it found that the appellees are the owners of Lot 9 and the accretion thereto north of the centerline of the slough. The appellants assert that because the appellees failed to demonstrate that they are the owners of Lot 9, the appellees cannot be the owners of the accretion they were awarded. The appellants argue that because the appellees do not own the land on which the fence was installed, the appellees cannot properly claim that installation of the fence was a trespass. Gary Baasch contends that he is the owner of the accretion awarded to the appellees and that title should be quieted in him. For the reasons explained below, we reject the appellants' arguments.

Quiet Title.

The district court determined that the appellees are the owners of Lot 9 on the basis of the theory of the lost grant. The appellees have also asserted that they are the rightful owners of Lot 9 under the Marketable Title Act. Although we agree with the district court that the appellees are the legal owners of Lot 9, we affirm for different reasons.

Neb. Rev. Stat. § 76-288 (Reissue 2009) of the Marketable Title Act provides:

> Any person having the legal capacity to own real estate in this state, who has an unbroken chain of title to any interest in real estate by such person and his or her immediate or remote grantors under a deed of conveyance which has been recorded for a period of twenty-two years or longer, and is in possession of such real estate, shall be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as are not extinguished or barred by the application of the Uniform Environmental Covenants Act and sections 25-207, 25-213, 40-104, and 76-288 to 76-298, instruments which have been recorded less than twenty-two years, and any encumbrances of record not barred by the statute of limitations.

Neb. Rev. Stat. § 76-289 (Reissue 2009) provides:

> A person shall be deemed to have the unbroken chain of title to an interest in real estate as such terms are used in sections 25-207, 25-213, 40-104, and 76-288 to 76-298 when the official public records of the county wherein such land is situated disclose a conveyance or other title transaction dated and recorded twenty-two years or more prior thereto, which conveyance or other title transaction purports to create such interest in such person or his immediate or remote grantors, with nothing appearing of record purporting to divest such person and his immediate or remote grantors of such purported interest.
>
> Title transaction as used in sections 25-207, 25-213, 40-104, and 76-288 to 76-298, means any transaction affecting title to real estate, including title by will or descent from any person who held title of record at the date of his death, title by a decree or order of any court, title by tax deed or by trustee's, referee's, guardian's, executor's, master's in chancery, or sheriff's deed, as well as by direct conveyance.

Neb. Rev. Stat. § 76-290 (Reissue 2009) provides:

> Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of all interest, claims, and charges whatever, the existence

> of which depends in whole or in part upon any act, transaction, event, or omission that occurred twenty-two years or more prior thereto, whether such claim or charge be evidenced by a recorded instrument or otherwise, and all such interests, claims, and charges affecting such interest in real estate shall be barred and not enforceable at law or equity, unless any person making such claim or asserting such interest or charge shall, on or before twenty-three years from the date of recording of deed of conveyance under which title is claimed, or within one year from April 8, 1947, whichever event is the latest in point of time, file for record a notice in writing, duly verified by oath, setting forth the nature of his claim, interest or charge; and no disability nor lack of knowledge of any kind on the part of anyone shall operate to extend the time for filing such claims after the expiration of twenty-three years from the recording of such deed of conveyance or one year after April 8, 1947, whichever event is the latest in point of time.

Enacted in 1947, § 76-288 has been described as setting "forth the criteria which must be satisfied in order for a person to be deemed to have a marketable record title." Gregory B. Bartles, Comment, *The Nebraska Marketable Title Act: Another Tool in the Bag*, 63 Neb. L. Rev. 124, 145-46 (1984). The purpose of the Marketable Title Act was to set a time behind which people examining title to land would not have "to look for discrepancies in title in order to determine whether or [not] it is a good marketable title" and thus "protect the public against the overmeticulous title examiner." Judiciary Committee Hearing, L.B. 175, 60th Leg. (Feb. 12, 1947).

It has been observed that marketable title acts are designed to work in conjunction with the recording acts, and not to supplant them. Bartles, *supra*. Thus, it remains appropriate to refer to the recorded documents relative to the land at issue and it is logical to do so in order to determine the "root of title" which is a conveyance of land which serves as the foundation upon which a person currently claiming a chain of title relies. *Id.* at 136.

The "root of title" concept has been explained as

> "that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date [twenty-three] years prior to the time when marketability is being determined. The effective date of the 'root of title' is the date on which it is recorded."

Id. (quoting Model Marketable Title Act § 8(e), reprinted in Lewis M. Simes & Clarence B. Taylor, The Improvement of Conveyancing by Legislation (1960)). The "root of title" concept is embodied in the Marketable Title Act at §§ 76-288 and 76-290.

Subject to certain exceptions in the Marketable Title Act, persons who satisfy four requirements for invoking the aid of the act are deemed to have marketable record title. In particular, it has been observed:

> In order to invoke the aid of the [Marketable Title] Act, persons must: (1) have the legal capacity to own real estate in Nebraska; (2) have an unbroken chain of title to any interest in real estate by the person and the person's immediate or remote grantors; (3) have the unbroken chain of title trace through a deed of conveyance which has been of record for twenty-three years or longer; and (4) be in possession of such real estate.

Bartles, *supra* at 137.

We considered the act in *Smith v. Berberich*, 168 Neb. 142, 95 N.W.2d 325 (1959). In *Smith*, we determined that a quitclaim deed did not serve as a satisfactory root of title document and that the appellees in that case could not invoke the aid of the Marketable Title Act to sustain their claim of ownership of the land by absolute title. In *Smith*, a patent to land was issued in 1911, naming the heirs of Lewis E. Smith, 10 brothers and sisters, as patentees. One of these heirs, Francis L. Smith, executed and delivered a quitclaim deed to Lizzie M. Smith, his wife. In 1946, after Lizzie Smith had died intestate in 1935, the county court assigned the entire tract of land to Lizzie Smith's heirs, the appellees. Relying on the quitclaim

deed and the Marketable Title Act, the county court quieted title in the appellees. The county court reasoned that because the appellees were the successors in interest of a grantee of the land by a quitclaim deed from a tenant in common, which had been recorded for more than 22 years, the appellees were entitled to the land.

We reversed the award of land in the appellees in *Smith*. We noted initially that the patent, the quitclaim deed, and the decree of heirship constituted the entire chain of title. In reversing, we determined that a quitclaim deed was not the kind of conveyance that could have created, under the Marketable Title Act, an entire title to the land in the grantee.

In *Smith*, we explained, "This court has consistently adhered to the doctrine that the distinguishing characteristic of a quitclaim deed is that it is a conveyance of any interest or title of the grantor in and to the land described rather than of the land itself." 168 Neb. at 146, 95 N.W.2d at 327. The quitclaim deed from Francis Smith to Lizzie Smith purported to create in Lizzie Smith nothing more than the interest that her grantor, Francis Smith, had in the land, which the record suggested was an undivided one-tenth interest as a tenant in common. The quitclaim deed did not purport to create in Lizzie Smith an entire title to the land nor to convey the land itself. We stated in *Smith* that the appellees were claiming an interest in the land that was more extensive than that which the quitclaim deed purported to create in the grantee, Lizzie Smith.

We noted in *Smith* that if the conveyance from Francis Smith to Lizzie Smith had purported to create an entire title to the land in the grantee, Lizzie Smith, then it would have served as a conveyance which satisfied the provisions of the Marketable Title Act, and the appellees in that case would have been able to invoke the aid of the act to sustain their claim of title to the land. We determined that the quitclaim deed at issue was not the type of conveyance that could serve as the root of title under the Marketable Title Act.

Unlike *Smith*, the evidence in this case includes a document which conveyed the land, Lot 9, and can serve as the proper root of title foundation under the Marketable Title Act. On the record before us, the warranty deed from Anna Granlund to

Albin Granlund, filed October 12, 1923, can serve as the root in the chain of title. That warranty deed provided that in consideration for $3,000, Anna Granlund granted and conveyed to Albin Granlund the real estate in Howard County described in part as follows:

> Lot Numbered Nine (9) on Island Numbered One (1) in Section Twenty Two (22), in Township Thirteen (13) North,of Range Eleven (11) West,of the Sixth Principal Meridian,located in the Loup River, according to Survey thereof made by Robert Harvey,County Surveyor,on the 29″,30″ and 31″ days of January,1894, and recorded in Surveyors Record No.1, at Page 405.

The warranty deed further provided:

> *And* I [Anna Granlund] *do hereby covenant with the said Grantee , and with* his *heirs and assigns that* I am *lawfully seized of said premises; that they are free from encumbrance*[;] *that* I *have good right lawful authority to sell the same; and* I *do hereby covenant to warrant and defend the title to said premises against the lawful claims of all persons whomsoever*.
>
> *And the said* Anna Carolina Granlund *hereby relinquishes all* her right,title and ownership whatsoever *in and to the above described premises*.

Unlike the quitclaim deed in *Smith v. Berberich*, 168 Neb. 142, 95 N.W.2d 325 (1959), this warranty deed conveys the land and all interests to the land that is described, not just the mere interest in the land of the grantor.

[4] If a title is merchantable, it is marketable, and we have stated that a "'merchantable title is a title which a man of reasonable prudence, familiar with the facts and the questions of law involved, would accept as a title which could be sold to a reasonable purchaser.'" *Podewitz v. Gering Nat. Bank*, 171 Neb. 380, 389, 106 N.W.2d 497, 504 (1960) (quoting *Northouse v. Torstenson*, 146 Neb. 187, 19 N.W.2d 34 (1945)). The warranty deed from Anna Granlund to Albin Granlund has the hallmarks of merchantable title, and we treat it as a marketable title.

After Anna Granlund conveyed Lot 9 to Albin Granlund by warranty deed in 1923, Paul Obermiller purchased Lot 9

at an auction in 1973. Incidentally, Dennis Baasch testified that he was present at this auction. Paul Obermiller received a quitclaim deed from Albin Granlund's heirs and an executor's quitclaim deed on behalf of the estate of William Granlund. In 1995, Paul Obermiller conveyed Lot 9 to himself and Betty Lou Obermiller, his wife, by a joint tenancy warranty deed.

The recorded document which serves as the root of title in this case is the warranty deed from Anna Granlund to Albin Granlund in 1923. Being recorded in 1923, it has been recorded for longer than 22 years prior to the time when marketability is being determined in this case, and there has been a recorded chain of title since that time. There is no evidence purporting to divest the appellees of their interest. See § 76-289. And the appellees established possession of Lot 9. See § 76-288. Therefore, under the Marketable Title Act, the appellees own Lot 9.

[5-8] Under Nebraska law, because the appellees own Lot 9, which is part of an island, they also own the accretion to Lot 9 to the thread of the slough. In *Babel v. Schmidt*, 17 Neb. App. 400, 765 N.W.2d 227 (2009), the Nebraska Court of Appeals explained the law of accretion in Nebraska. The court stated:

> Under Nebraska law, title to riparian lands runs to the thread of the contiguous stream. *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000). The thread, or center, of a channel is the line which would give the landowners on either side access to the water, whatever its stage might be and particularly at its lowest flow. *Id.* The same principles in setting the boundary at the thread of the stream are applicable to islands within the river. Where title to an island bounded by the waters of a non-navigable stream is in one owner and title to the land on the other shores opposite the island is in other owners, the same riparian rights appertain to the island as to the mainland. *Winkle v. Mitera*, 195 Neb. 821, 241 N.W.2d 329 (1976).

Babel, 17 Neb. App. at 417, 765 N.W.2d at 240. The thread of the stream is that portion of a waterway which would be the last to dry up. *Madson v. TBT Ltd. Liability Co.*, 12 Neb. App.

773, 686 N.W.2d 85 (2004) (citing *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957)).

Here, the evidence shows that Lot 9 was originally part of an island located in the Middle Loup River, with a channel of the river running on the north of the island and a channel running on the south. The record shows that over time, the channel along the south of Lot 9 has narrowed, and it is now the slough. Witnesses for all parties testified that the slough still empties into the Middle Loup River. Because of the narrowing of the south channel, there is now land between Lot 9 and Lot 5 which was not evident on earlier surveys. Because we have determined that the appellees own Lot 9, under Nebraska riparian law, they are also the owners of the accretion thereto situated north of the thread of the stream, which is the centerline of the slough. This is the determination reached by the district court. Accordingly, although for reasons different from those of the district court, we determine that the district court properly quieted title in Lot 9, and the accretion thereto north of the thread of the slough, in the appellees and denied Gary Baasch's claim for quiet title.

Trespass and Injunction.

The district court found that the installation of a fence by the appellants on the property of the appellees was a trespass on the appellees' land. The court ordered the appellants to remove the fence and enjoined them from blocking or denying access to the appellees' property. For the reasons which follow, we affirm.

An action for injunction sounds in equity. *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006). On appeal from an equity action, we try factual questions de novo on the record and, as to questions of both fact and law, we are obligated to reach a conclusion independent from the conclusion reached by the trial court. *Id.*

[9] To bring an action in trespass, the complaining party must have had title to or legal possession of the land when the acts complained of were committed. *Id.* As explained above, we have affirmed the determination that the appellees own both Lot 9 and the accretion north of the centerline of the slough

upon which the appellees constructed a fence. Accordingly, the appellees may bring an action in trespass.

[10,11] Liability for trespass exists if an actor intentionally enters land in the possession of another, or causes a thing or third person to do so. *Id*. A trespass can be committed on, above, or beneath the surface of the land. *Id*. In the present case, the appellants intentionally constructed a fence along the boundary of Lot 9 on the appellees' land. As explained above, Lot 9 and the accreted land at issue are owned by the appellees; therefore, the appellants constructed this fence on land owned by the appellees. This fence blocks trails and access from Lot 9 to the appellees' accreted property. Because the appellants' construction of a fence on the appellees' land prevents the enjoyment of the appellees' rights of possession and property in the land, see *id*., it constitutes a trespass.

[12] Although where simple acts of trespass are involved, equity will not act, *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001), given the evidence in this case, an injunction is necessary because the fence constructed by the appellants constitutes a continuous and repeated trespass. See *Lambert v. Holmberg, supra*. In *Lambert*, we stated:

> Where an injury committed by one against another is continuous or is being constantly repeated, so that complainant's remedy at law requires the bringing of successive actions, that remedy is inadequate and that injury will be prevented by injunction. . . . In such cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.

271 Neb. at 450, 712 N.W.2d at 275.

Here, the appellants' act of installing the fence on the appellees' land impaired the appellees' access to and enjoyment of their land. Because the fence on the appellees' land constituted a continuous trespass, in equity, injunctive relief was appropriate. Other jurisdictions have similarly granted injunctive relief directing the removal of fences constructed on another's land. See *Brandao v. DoCanto*, 80 Mass. App. 151, 951 N.E.2d 979 (2011) (determining grant of injunction ordering removal of

portions of new building and fence encroaching on owner's land was not inequitable); *Seminary v. DuPont*, 41 So. 3d 1182 (La. App. 2010) (finding that neighbor's fence encroached upon homeowner's property, supporting issuance of mandatory injunction); *Crow v. Batchelor*, 456 S.W.2d 241 (Tex. Civ. App. 1970) (determining trial court's grant of mandatory injunction requiring defendant to remove fence was not abuse of discretion).

The district court properly enjoined the appellants. Therefore, we affirm the order of the district court.

CONCLUSION

The appellees are the rightful owners of both Lot 9 and the accretion north of the centerline of the slough, as the district court correctly determined. Because the appellees own the land, the appellants' intentional installation of a fence on the land constituted a continuous trespass, and the appellees were entitled to an injunction, as the district court ordered. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUSTIN D. HOWELL, APPELLANT.

822 N.W.2d 391

Filed October 26, 2012. No. S-12-115.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, the appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that the appellate court reviews independently of the trial court's determination.
2. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.