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ANNOTATION

NECESSARY OR PROPER PARTIES TO SUIT OR PROCEEDING TO ESTABLISH PRIVATE BOUNDARY LINE

by

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TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

12 AM JUR 2d, Boundaries §§ 95, 96

5 AM JUR PL & PR FORMS (Rev Ed), Boundaries, Forms 41 et seq.

3 AM JUR LEGAL FORMS 2d 709, Boundaries §§ 44:91 et seq.

2 AM JUR PROOF OF FACTS 649, Boundaries

ALR DIGESTS, Boundaries § 20

ALR QUICK INDEX, Boundaries; Cotenancy and Joint Ownership; Parties

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TABLE OF JURISDICTIONS REPRESENTED

Consult POCKET PART in this volume for later cases

I. Preliminary matters

§ 1. Introduction

[a] Scope

This annotation[1] collects the cases which discussed the question who are necessary, proper, or indispensable parties[2] to a suit or proceeding[3] the specific or primary purpose of which

1. It supersedes one in 137 ALR 723.

2. The terms "proper," "necessary," and "indispensable" parties have been variously defined in the courts. See 59 Am Jur 2d, Parties §§ 11–14. The annotation includes cases only where the court uses at least one such term in its decision; and it covers the questions who may or must sue or be sued in a suit or proceeding brought to ascertain boundaries.

3. The scope extends to reported decisions involving proceedings for the ascertainment of disputed boundaries by commissions or, as they are called in some states, "processioners." See 12 Am Jur 2d, Boundaries § 94.

is to establish or ascertain a boundary line[4] to private[5] property.[6]

[b] Related matters

Boundaries: description in deed as relating to magnetic or true meridian. 70 ALR3d 1220.

Ignorance or mistake as to boundaries as affecting adverse possession. 80 ALR2d 1171.

Intervening rights of third persons as affecting reformation of instrument for mistake in boundaries. 79 ALR2d 1180.

Determination of boundaries of public highway established by prescriptive use. 76 ALR2d 535.

Trust beneficiaries as necessary parties to action relating to trust or its property. 9 ALR2d 10.

Comment note.—Fence as a factor in fixing location of boundary line. 170 ALR 1144.

Establishment of boundary line by oral agreement or acquiescence. 69 ALR 1430, 113 ALR 421.

Who must be joined in action as person "needed for just adjudication" under Rule 19(a), Federal Rules of Civil Procedure. 22 ALR Fed 765.

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Hazard, "Indispensable Party: the Historical Origin of a Procedural Phantom," 61 Columbia L Rev 1254.

Reed, "Compulsory Joinder of Parties in Civil Actions," 55 Mich L Rev 327, 483.

§ 2. Summary and comment

[a] Generally

The general rule is that, in a suit or proceeding brought to establish the boundary line between adjoining parcels of land,[7] there must be included as necessary parties thereto the owners of such parcels as are bounded by the disputed line,[8] and all other persons who have a direct interest in the result of the suit or proceeding or who will have their rights materially affected thereby.[9] One court has stated broadly that in such a suit or proceeding, necessary parties include the owners of such adjoining parcels and all other persons who have a direct interest in the result of the suit or proceeding, whether the estates of such persons be in possession, reversion, or remainder, or whether such estates are held in severalty or among cotenants, because otherwise they are not bound by the determination of the location of the boundary line.[10] On the other hand, a number of cases have held that particular individuals were not necessary, or in some instances not even proper, parties to boundary line litigation, where their rights were not directly affected by or their interests were only incidentally

4. The term "boundary line," for present purposes, refers to the marking or dividing line between contiguous tracts of land.

5. The scope does not extend to the issue of parties in suits brought to determine the boundaries of local governmental units.

6. Only incidental coverage, therefore, is given to cases involving other real estate actions or proceedings, such as ejectment, trespass, suits to quiet title, or to remove a cloud on title, in which the question of a disputed boundary was at issue and discussed.

7. As to the rights, duties, and liabilities of adjoining landowners, inter se, arising from, or incident to, the fact of contiguity, see, generally, 1 Am Jur 2d, Adjoining Landowners §§ 1 et seq.

8. § 3[a], infra.

9. § 4[a], infra.

10. See Cady v Kerr (1941) 11 Wash 2d 1, 118 P2d 182, 137 ALR 713.

involved in the outcome of the suit.[11] While the particular facts of each case will determine whether the common grantor of the parties is a necessary or proper party to a suit to establish boundaries to adjacent lands,[12] in most instances, the grantor of plaintiff or defendant has been held not to be a necessary party to such a suit,[13] as in a case where neither the defendants' grantor nor his wife sought to intervene.[14] There is authority, however, that the grantee of a defendant is a proper if not a necessary party to such a suit.[15] Where a life tenant sues to establish a boundary line, the remaindermen of the estate have been deemed in a number of specific instances to be proper or necessary parties, and it has been held that where the life tenant dies while the case is pending, the remaindermen may properly be substituted in the life tenant's place.[16]

It has been decided in particular cases that all landowners who are entitled to share in the apportionment of a tract of accretion land are indispensable parties to a suit to establish the location of boundary lines within such a tract;[17] that joint tenants and tenants in common of adjoining tracts must be made parties to a suit to settle a disputed boundary between such tracts if they are to be bound by the determination of the line;[18] and that, in a suit to settle a disputed boundary to adjoining tracts, a mortgagee of one of the tracts is a necessary party.[19] On the other hand, there have been rulings that defendant landowner in a suit to ascertain a boundary to his land need not join his wife where her only interest in the land is an inchoate right of dower;[20] and that plaintiff landowner could maintain such a suit alone even though he owned the subject land with his wife as tenants by the entireties.[21] Under a peculiar fact situation, it has been held that in a suit between the respective owners of mineral interests in adjoining lands to settle the boundary, the owners of the respective surface interests in such lands were proper but not indispensable parties, but that one who extracted ore under leases from each of the owners of the mineral interests was a proper and necessary party defendant.[22]

Proper party plaintiffs in a suit to ascertain boundaries between adjacent tracts of land have been deemed to include, among others, the owner[23] or the part owner[24] of one such tract, as well as a person who has an interest in the land by inheritance and is in possession of it as a homestead.[25]

Generally, it is incumbent upon a

11. § 4[b], infra.

12. § 5[a], infra.

13. § 5[b, c], infra.

14. Lentell v McBride (1936) 7 Cal 2d 263, 60 P2d 289, infra § 5[c].

15. § 6, infra.

16. § 7, infra.

17. § 8, infra.

18. § 3[b], infra.

19. § 9, infra.

20. § 10, infra.

21. Nesbitt v Fairview Farms, Inc. (1954) 239 NC 481, 80 SE2d 472, infra § 3[b].

22. Georgia Peruvian Ochre Co. v Cherokee Ochre Co. (1921) 152 Ga 150, 108 SE 609, infra §§ 3[c] and 18.

23. § 11, infra.

24. § 13, infra.

25. Turnbow v Richardson (1941, Tex Civ App) 149 SW2d 616, error dismd, infra § 14.

plaintiff when he institutes a suit to name the proper party a defendant to his cause of action.[26] As a rule, parties defendant in a suit to ascertain boundaries between adjacent lands should include owners of such lands[27] even if their property has been adjudicated to the state for nonpayment of taxes.[28] So a court has said that in such a suit, the parties defendant should include all persons whom the plaintiff can ascertain to be interested as landowners.[29] And in contrast to authority that in a suit to ascertain boundaries to adjacent lands all persons having claims to realty along the disputed line which are adverse to plaintiff are properly made defendants,[30] it has been held that a landowner cannot maintain an action to ascertain boundaries against the lessee of an adjoining tract.[31]

[b] Practice pointers

Since the plaintiff chooses his forum and those against whom he wants to litigate, it is usually the defendant's counsel who raises objection to the absence of some person, although the plaintiff's counsel may also determine after preliminary skirmishing in a case that he wants a party added. With respect to when counsel may take action to join an absentee, the Federal Rules of Civil Procedure and similar provisions declare that parties may be added at any stage of the action.[32]

Counsel should note that the right to appeal[33] a judgment in a suit to establish boundary lines between adjoining lands has been denied to the grantor of one who deeded the subject property to plaintiff, where this first grantor failed to allege any warranty.

It was held in Barataria Land Co. v Louisiana Meadows Co. (1923) 154 La 461, 97 So 658, that the grantor of land to one who deeded it without warranty to the plaintiff in an action to establish the boundary between it and the adjoining land, to which the first grantor was not a party, did not have the right to appeal from a judgment in such action in favor of the substituted plaintiff, the grantee of the plaintiff, under a statute giving a third person, not a party to the suit, the right to appeal upon alleging and proving a pecuniary interest affected by the judgment, where such first grantor did not allege that he sold the land with warranty, but that he was sued in warranty by the plaintiff in the boundary action who pretended to have retained his action of warranty, and had a secret understanding with the substituted plaintiff, whereby an erroneous boundary line was established.

II. Necessary or proper parties, in general

§ 3. Owner of tract bounded by lines to be determined

[a] Generally

The following cases support the view that in a suit or proceeding

26. 59 Am Jur 2d, Parties § 45.

27. § 16, infra.

28. § 19, infra.

29. Dudley v Meyers (1970, CA3 VI) 422 F2d 1389.

30. § 17, infra.

31. § 18, infra.

32. 59 Am Jur 2d, Parties § 192.
For forms pertaining to adding proper, necessary, or indispensable parties, see 19 Am Jur Pl & Pr Forms (Rev Ed), Parties, Forms 171–202.

33. See 4 Am Jur 2d, Appeal and Error §§ 172 et seq.

brought to ascertain the boundary between adjoining lands, the owners of such lands as are bounded by the disputed line are necessary parties.[34]

US—For federal cases involving state law, see state headings infra.

Ala—Finley v Kanter (1950) 256 Ala 103, 53 So 2d 347; Elliott v Lenoir (1955) 263 Ala 73, 81 So 2d 274; Easterling v Cleckler (1959) 269 Ala 660, 115 So 2d 516; Morris v Owens (1974) 292 Ala 159, 290 So 2d 646, 73 ALR3d 944.

Ga—Georgia Peruvian Ochre Co. v Cherokee Ochre Co. (1921) 152 Ga 150, 108 SE 609.

Ky—Liter v Shirley (1896) 18 Ky LR 107, 35 SW 550 (processioning proceeding); Hazard Coal Corp. v Getaz (1930) 234 Ky 817, 29 SW2d 573.

La—Bergeron v Babin (1929) 167 La 833, 120 So 384.

New Orleans & N. E. R. Co. v Redmann (1946, La App) 28 So 2d 303; Hutchinson v Robinson (1951, La App) 52 So 2d 565; Robinson v Allen (1956, La App) 88 So 2d 64; Esso Standard Oil Co. v Catsulis (1961, La App) 136 So 2d 431; Brashears v Hood (1962, La App) 137 So 2d 88.

Tex—McDonald v Humble Oil & Refining Co. (1935, Tex Civ App) 78 SW2d 1068, error dismd w o j.

VI—Dudley v Meyers (1970, CA3 VI) 422 F2d 1389 (applying Virgin Islands law).

Wash—Cady v Kerr (1941) 11 Wash 2d 1, 118 P2d 182, 137 ALR 713.

To determine a disputed boundary all parties who own an interest in involved lands should be parties to the proceeding, in order for the court to have before it the title to the property which is sought to be affected by the decree, stated the court in Morris v Owens (1974), 292 Ala 159, 290 So 2d 646, 73 ALR3d 944.

The court in Bergeron v Babin (1929) 167 La 833, 120 So 384, said that the only necessary parties to a suit to establish boundaries between adjacent lands are the plaintiffs and defendants who are in court and demand that the boundary line between their respective properties be established.

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The owners of adjoining lots are necessary parties to a suit between the respective purchasers of the lots under forfeitable executory contracts of sale, to establish the true boundary line between the lots.[35] And it has been held proper to include as parties to a proceeding to ascertain boundaries between adjoining lands all persons who have an ownership interest in such lands, even though this interest is acquired after commencement of the proceeding.[36]

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34. As subsequently discussed, these owners may maintain the suit as party plaintiff (see § 11, infra), or should appear therein as party defendant (see § 16, infra).

35. Cady v Kerr (1941) 11 Wash 2d 1, 118 P2d 182, 137 ALR 713.

36. Thus, in a proceeding before the clerk of the court and appealed to the court for processioning the lands of the parties and ascertaining the true boundary lines, it was held in Batts v Pridgen (1908) 147 NC 133, 60 SE 897, that persons who had acquired an interest in land involved were properly made parties, although the deeds under which they claimed title were not registered until after the proceeding was instituted. It was said that these persons were properly made parties in order to permit a final determination of the matter in controversy upon the merits, and to prevent a failure of justice.

[b] Cotenants and joint owners

The following cases each applied to particular factual situations the proposition that cotenants or joint owners of land are necessary parties to a suit to settle a disputed boundary between such land and an adjoining tract, and must be made parties to the suit if they are to be bound by the determination of the line.

In Bryan v W. T. Smith Lumber Co. (1965) 278 Ala 538, 179 So 2d 287, an equitable action for a decree determining and establishing a disputed boundary, plaintiffs (two brothers) owned an individual one-third interest in a tract of land and defendant corporation owned an adjoining tract. Reversing a decree adverse to plaintiffs and remanding, the court, saying that tenants in common are necessary parties in a suit to settle a disputed boundary, held that whether or not the present suit amounted to a collateral attack on a prior circuit court decree which confirmed an agreement between the plaintiffs' brother who owned the remaining two-thirds interest and the defendant corporation as to the determination of the boundary line, such prior decree would be no bar to the success of the present attack because here it was shown that the circuit court had no power to adjudicate and conclude plaintiffs' rights, where the plaintiffs were not parties to the prior action, and where the circuit court in the prior action did not acquire jurisdiction over them.

In Morris v Owens (1974) 292 Ala 159, 290 So 2d 646, 73 ALR3d 944, a suit to establish a private boundary line, the defendant pointed out that plaintiff's basis of title to the disputed areas was a "joint and survivorship deed" to the plaintiff and his wife, and that plaintiff failed to join his wife (a joint tenant with a right of survivorship) as a party complainant. Defendant argued that there could be no adjudication of the interest of the wife because she was not a party before the court in the present or any other action. Reversing a judgment for defendant, and remanding, the court held that plaintiff's wife was a necessary and indispensable party to the cause and that her absence made the proceedings in the trial court void. Further holding that a joint tenant with the right of survivorship is a person who has a direct interest in the result of the proceedings to settle disputed boundary lines and is, therefore, a necessary and indispensable party, the court explained that to determine a disputed boundary all joint tenants with the right of survivorship, as well as all parties who own an interest in involved lands, should be parties to the proceedings in order for the court to have before it the title to the property which is sought to be affected by the decree.

See Groover v Durrence (1927) 36 Ga App 543, 137 SE 299, holding that, upon an application for the processioning of land, where the only dispute was as to the dividing line between two tracts of land, brought by certain persons as tenants in common, and where it did not appear that any other person had any title to the land, it was not error to overrule the protestant's motion to dismiss the case upon the ground that there was a failure to make all the tenants in common parties plaintiff to the proceeding.

And see Carney v Edwards (1961) 256 NC 20, 122 SE2d 786, an action to remove a cloud from plaintiff's title to a tract of land, which action presented a boundary line issue, wherein it was held that plaintiff's cotenant should be made a party, since the cotenant would not be bound by the

ultimate decision unless she was made a party.

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The following case held that a husband could maintain a suit to establish boundaries without joinder of his wife although the couple owned the subject land as tenants by the entireties.

In Nesbitt v Fairview Farms, Inc. (1954) 239 NC 481, 80 SE2d 472, where plaintiff and his wife owned land as tenants by the entireties, the court held that plaintiff, being entitled to the possession and control of the estate by the entireties, had the right to have the true boundary lines thereof ascertained, and could maintain the proceeding for the establishment of the boundary lines even without joinder of his wife, who was not a necessary party to such proceeding. In so holding the court applied rulings in analogous cases which held that a husband alone without joinder of his wife could maintain an action for damages to land held by the husband and wife as tenants by the entireties.

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It has been held to be necessary in a proceeding to have lines surveyed and marked anew around a tract of land that all tenants in common of the subject tract must be made parties to the proceeding.

Where it appeared from an application for processioning that the applicants and other persons, not named in the application, were tenants in common of the land around which it was sought to have the line surveyed and marked anew, the court in Carmichael v Jordan (1908) 131 Ga 514, 62 SE 810, held that it was error to overrule a motion of a protestant to dismiss the application on the ground that the other tenants in common were not parties thereto. Noting a statute which provided that every owner of land who desires the lines around the same to be surveyed and marked anew shall apply to the processioners to have this done, the court concluded that, manifestly, one of several common owners of a tract of land cannot, on his application alone, have it processioned, since in order that there be an end of controversies as to the location of land lines, all owners of the land around which the lines are to be surveyed and marked anew should be made parties to the application, just as all the owners of adjoining lands, if resident within the state, must be notified, and, as it were, made parties defendant to the proceedings. Otherwise, concluded the court, the proceeding would be of no avail, since if one of many common owners can proceed, in his own behalf alone, to have the tract of land in which he holds an undivided interest processioned, then the owners of adjoining lands might be harassed by a different proceeding for a like purpose separately brought by each of the other common owners. The court further concluded that the fact it was alleged in the application that the applicants were authorized to act for the other owners of the land did not cure the defect in the application, it not appearing in what manner such authority was given, so that the question of its sufficiency for the purpose for which it was alleged to have been given might be determined; and, in addition, the court said that there were reasons which might readily be suggested why the owners of the lands adjoining the tract around which the lines were to be run and marked anew were entitled to know who were the applicants and alleged

owners of such tract, other than those whose names were signed to the application.

[c] In suits by holders of mineral interests

The following case held that under the facts presented, owners of surface interests of adjacent lands were proper but not indispensable parties to a suit between the respective owners of mineral interests in such tracts to settle the boundary.

The court said in Georgia Peruvian Ochre Co. v Cherokee Ochre Co. (1921) 152 Ga 150, 108 SE 609, a suit between the respective owners of the minerals of adjacent lots to settle the boundary line and the right to royalties for ore extracted from the disputed area, that so far as the allegations of the petition disclosed, the surface interest in both lots might be owned by the same party or by the respective owners of the mineral interests in the lots, that if the surface interest in one lot were in one person and the surface interest in the other lot were in another person, the surface owners would be proper parties, but they would not be indispensable parties, since they were not directly interested in the minerals, and their interests would not be directly affected by the settlement of the dispute between the owners of the mineral interests, that, at least so far as disclosed by the petition, the interest of the surface owners would not necessarily be affected by the granting of the relief sought in the action, and that, considering the allegations of the petition, the surface owners were not necessary parties to the action.

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It has been held that in the circumstances of the following case, a suit by holders of mineral leases to settle a boundary, fee owners of the subject land were not indispensable parties.

Thus, in a suit to quiet title and to remove a cloud upon title in which the issue was one of boundary, brought by the respective holders of oil and gas leases on certain lands against the claimant of other land asserting title to the oil, gas, and minerals thereunder, it was held in Lamb v Bonds & Dillard Drilling Corp. (1935, Tex Civ App) 107 SW2d 500, that the fee owners of the lands on which the plaintiffs held leases were not "indispensable parties in the strict sense," because they would not be affected adversely by any judgment which might be rendered. The court indicated that these fee owners, not being parties, could not be bound by the judgment in the suit.

§ 4. Impact of boundary determination on rights or interests as decisive factor, generally

[a] Persons found to be necessary or proper parties

The ensuing cases held or recognized that necessary or proper parties to boundary line litigation include persons other than the owners of the adjoining lands directly involved in the dispute, where it appears that the rights or interests of such persons will be affected by the determination of the line.

Thus, on reversing the judgment and remanding for a new trial, in an action by the respective owners, under an act for the permanent survey of lands, in which the petition prayed for the appointment of a commission of surveyors to make survey of, and to permanently establish, the boundary line between their lands in a quarter section, the court said in Irvin v Rotramel (1873) 68 Ill 11, that it appeared that there were several other proprietors interested in the

line, and that it would therefore be advisable, on a new trial, to make them parties, so as to avoid further litigation, by a final adjudication upon the rights of all interested parties. The court did not state precisely which lots such other proprietors owned.

The court in New Castle v Hunt (1910) 47 **Ind** App 249, 93 NE 173, an action by the owner of land abutting upon an alley to establish the boundary line of the alley, and to enjoin the tearing up or other intereference with the alley as established, held that other abutting landowners on such alley were properly made parties, since the determination of the boundary line would necessarily affect their rights.

It was said in Hazard Coal Corp. v Getaz (1930) 234 **Ky** 817, 29 SW2d 573, that a court should not undertake to locate a land survey without having before it all parties whose interests might be affected thereby.

The court in State Dept. of Roads v Merritt Bros. Sand & Gravel Co. (1966) 180 **Neb** 660, 144 NW2d 180, held that in an action to have established or determined the corners or boundaries of land which are lost, destroyed, or in dispute, if any public road is likely to be affected thereby, it is required that the appropriate county be made a party.

In Labus v Jones (1963, CP) 26 **Ohio** Op's 2d 189, 93 Ohio L Abs 161, 197 NE2d 244, plaintiff sought a declaration to locate the site and width of an alley insofar as it ran between 4 numbered lots to the west and 4 numbered lots to the east thereof. Plaintiff owned 3 of these 8 numbered lots and various defendants owned the remaining 5 lots. Awarding judgment in accordance with the opinion, the court, saying that there were 16 other lots abutting the alley whose owners had not been made parties to the present action, concluded that the court could not make a final order as to the exact location of the alley binding all parties who were the owners of lots abutting on the alley until all of the abutting property owners who would be affected by a court order fixing the location of the alley were made parties to a proper proceeding to determine such location.

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The following case held that all the owners of shorelands in a cove having an irregular curvature would be proper parties in an action to ascertain the uncertain boundaries of any one tract therein.

In an action to establish the boundaries between each and all of the tracts of shorelands owned severally by each of the numerous plaintiffs and defendants abutting on their respective uplands on and around a cove or bay at one end of a lake, in which some of the defendants contended that there was no direct controversy between them and the plaintiffs with respect to the location of the boundaries of such defendants' shorelands, it was held in Seattle Factory Sites Co. v Saulsberry (1924) 131 **Wash** 95, 229 P 10, that necessarily each and every boundary line dividing all the tracts was drawn in question, that a proper determination of one necessarily called for the determination of all the others, and that, therefore, it was proper to bring in the owners of all the tracts as parties to the action, to the end that the decree therein should be effective as against all such owners.

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The following case held that in a suit to determine the boundary between two adjoining sections of land,

all persons claiming ownership of land in such sections or in vacant lands adjoining one such section were necessary or at least proper parties to the litigation, and were subject to being made parties thereto at the discretion of the court.

In McDonald v Humble Oil & Refining Co. (1935, Tex Civ App) 78 SW2d 1068, error dismd w o j, a boundary suit and not an ordinary action in trespass to try title, though brought in that form, because there was no issue as to title, the only issue therein being the correct location upon the ground of two adjoining sections of land, where it appeared that a vacancy on each of two sides of one of such sections had been created and the vacant lands had been granted by the land office respectively to two different persons, and that if the location was as claimed by the owner of part of such sections, the plaintiff in the suit, the vacant lands would be wiped out, but that if the location was as contended by the defendant, the holder of oil leases on such sections, the grants of the vacant lands would be valid, it was held that since it was a boundary suit, all persons claiming land in such sections and the vacant lands were necessary parties, or subject to be made parties at the discretion of the trial court, because a judgment in favor of the plaintiff tying together the two sections would establish the location on the ground of the boundary lines of all four tracts of land, affecting adversely all claims to them. The basis of this holding was that since the judgment on principles of stare decisis would affect all claimants to the four tracts, they ought to have their day in court, the writer of the opinion stating the rule that by virtue of the doctrine of stare decisis a judgment of a court of final resort fixing the boundaries of a parcel of land is final and conclusive in a subsequent suit, wherein the same question arises, though neither the parties nor the subject matter are the same.

[b] Persons found not to be necessary or proper parties

In each of the following cases involving determinations of a boundary line between adjoining tracts of land, the court decided that under the facts presented particular individuals other than the owners of such adjoining real estate were not necessary or in some instances proper parties, it appearing to the court that the rights or interests of such individuals would not be directly affected by the outcome of the litigation.

In McCormick v Appleton (1964) 225 Cal App 2d 591, 37 Cal Rptr 544, a boundary dispute between owners of adjacent lots in a subdivision tract, the court held that other owners in the tract were not necessary parties to a disposition of the action, where it was found that there was a binding agreed boundary between the adjacent lots, and that plaintiffs had not agreed to be bound by a subsequent jointly financed survey, nor had they agreed to adjust the boundary lines according to the results of the survey which had been undertaken by several owners in the area.

In Stark v Marshall (1953, Fla) 67 So 2d 235, plaintiffs, husband and wife, sued defendants, also husband and wife, seeking to establish the true boundary between their adjoining lots in the same block. Affirming a ruling adverse to plaintiffs, the court held that the owners of a lot which adjoined plaintiffs' lot could not be brought in as parties on defendants' counterclaim. The court reasoned that not having land abutting on the

disputed boundary, the parties sought to be brought in on counterclaim were not and could not have been involved in the controversy out of which the disputed boundary arose, any more than could have other owners of property whose lots were situated in the subdivision but whose boundary lines were not coincident with the boundary lines of the lands in dispute between the original parties. The court noted that it has been held in proceedings to establish boundaries that a defendant cannot, under an allegation that if the boundary claimed by plaintiff is established his own will be so altered as to include land held by third persons, have the latter made parties to the suit. Such a conclusion was said to follow logically from the general rule on counterclaims, and as a necessary corollary of the principle that where a party has no interest in the boundaries between the parties to the suit, the mere fact that the division line between his lot and that of one of the parties is incidentally involved does not make him a necessary or a proper party to the action.

That the mere possibility of similar boundary controversies between the respective owners of a row of lots in a block was no ground for bringing them in as parties to the action involving the boundary between the owners of two other adjoining lots in the same block, where it appeared that each owner in the block except the last one was encroaching the same number of feet upon the land of his neighbor on the side toward the two lots in question, was held in Klinker v Schmidt (1898) 106 **Iowa** 70, 75 NW 672, an action by one of such two adjoining owners against the other for the recovery of a strip of land upon which the other was alleged to be encroaching, since the other lot owners were not so directly interested in fixing the boundary line between the lots of the two parties to the action as to make the former proper or necessary parties. The court stated that if the other owners were occupying the block regardless of boundary lines, it would not justify the defendant in retaining land belonging to the plaintiff, and that the mere fact that the plaintiff might recover of the defendant would not indicate that the latter and each other owner in turn would be entitled to recover a similar amount of land from his neighbor, although the litigation might settle the principles of law applicable to their situation, that it was not a case of avoiding a multiplicity of suits, as the defenses would not necessarily be the same, but of forcing others to participate in litigation in which they were not directly concerned, and that, supposing separate actions were pending between owners of the adjoining lots putting in issue the right to each strip of land overlapping, such actions could not be consolidated, because the subject matter in each would not be identical, nor would the parties or issues.

The court in Kennedy v Niles (1903, **Iowa**) 96 NW 772, concluded that where defendant, the owner of a lot, conveyed to plaintiff 30 feet thereof to be measured from the boundary line between such lot and the adjacent lot to the west, the owner of such adjacent lot was not a necessary or proper party to a suit to determine the boundary between the parcel of the plaintiff and the remaining parcel of the defendant, in which suit the line between the parcel of the plaintiff and such adjacent lot was to be fixed. The court said, regarding the objection that the owner of the adjacent lot was not made a party, that such owner of the adjacent lot

had no interest in the boundary between the parties to the suit, and that the mere fact the division line between his lot and defendant's lot was incidentally involved did not render him a necessary or proper party to the action.

In an action of trespass in which the defendant urged that the locus in quo was not within plaintiff's land, but within that of defendant, and according to the court the action therefore assumed the character of one of bornage, the defendant filed an answer alleging that if the plaintiff should prove himself entitled to locate his land as claimed by him, that is to say, by running the lower line of his tract down the bayou, the defendant would become entitled to have the lower line of his own tract, which would be thus displaced, moved down the bayou, and entitled to take land in possession of others, whom he, therefore, prayed might be made parties, and such others, being cited as defendants, urged that they would become entitled to have their own lower line also moved down the bayou over the land of others whom they, therefore, asked to be made parties, it was held in Duplessis v Lastrapes (1845, La) 11 Rob 451, that the other owners were not proper parties, that the object of the suit was to fix the boundaries of the lands of the original parties, and should be restricted to that purpose. The court said that if it were conceded that the defendant had the right of making his neighbors parties, and they their own, then there would be no limitation to the number of parties that might be thus brought in.

In Bergeron v Babin (1929) 167 La 833, 120 So 384, an action to establish the boundary line between the tracts of land owned respectively by the plaintiffs and the defendants, the court held that since the judgment could affect only the parties to the suit, it did not deem it necessary to force into the litigation third persons, owners of other land, who had not voluntarily intervened to assert their rights. The court said that the only necessary parties to the present suit were the plaintiffs and the defendants, who were in court to demand that the boundary line between their respective properties be established.

See Barrataria Land Co. v Louisiana Meadows Co. (1920) 146 La 999, 84 So 334, saying that where the purpose of a suit is merely to establish the boundary between the lands of the plaintiff and those of the party made defendant, it is not necessary, though it might be desirable, that other persons whose rights are not sought to be affected, and cannot be affected, unless they are made parties, should be brought in.

Where the statute giving one owning land or any interest therein a right of action against the owner or persons interested in the adjoining land to have the boundary lines fixed and established, provided that the court should require to be made a party any owner, lienholder, or person interested in any of the tracts involved necessary for a full adjudication of all the questions involved, and that it might also in its discretion order to be made parties the owners and persons interested in other tracts than those originally involved, it was held in Rock v Donora Min. Co. (1904) 91 Minn 259, 97 NW 889, that it could not be construed to the effect that all tracts of land the boundaries of which were fixed by relation to any point on the line in dispute between the original parties to the action were necessarily involved in such action, and that their respective owners were necessary par-

ties whether or not there was any dispute between them as to the location of the boundaries of their own land, but that such statute should be construed as making it mandatory upon the court to bring in as parties only those interested in the tracts originally involved, and that it was discretionary with it to bring in as parties those interested in other tracts, and it was further held that the court did not abuse its discretion in refusing to bring in as parties to a boundary action between adjacent owners in adjoining sections all the owners of lands in such sections and neighboring sections whose boundaries might be affected by the establishment of the location of a corner upon which the disputed boundary line depended.

The rule that all persons interested in the object of a suit and whose rights will be directly affected by the decree must be made parties was held in Stahlman v Riordan (1921, Tex Civ App) 227 SW 726, error dismd w o j, not to require the owners of other lands to be made parties to a suit in trespass to try title—in effect, a suit to establish the boundary, that being its sole object, between two adjoining tracts of land, which were the last two of a tier of tracts with a common lower boundary line. It appeared that by actual measurement between its fixed ends this line was longer than supposed, so that the excess was to be prorated between all the tracts, and it was contended that therefore the rule in partition requiring all the joint owners to be made parties applied, and the court, in overruling such contention, said that in partition the owners have undivided interests which are to be established and set aside in severalty, while the interests of the owners of the other tracts in the excess land in question were not undivided, but were owned by them in severalty; that the data by which the lines of their respective tracts might be located were a mere matter of mathematical calculation; that their proportionate shares were dependant upon the width of their respective tracts and, therefore, variable; and that while the fact that their shares were variable did militate against the view that they owned in severalty and that the only issue between them was that of boundary, they were not directly interested in the subject of the action, which was the true boundary between the tracts of the litigants, and the judgment therein would not be binding upon them, nor in any way affect their rights.

And citing the Stahlman Case (Tex) supra, as authority, it was likewise held in Great Plains Oil & Gas Co. v Foundation Oil Co. (1941) 137 Tex 324, 153 SW2d 452, a suit in trespass to try title whose purpose was to determine the true location of the boundary line between two adjoining tracts of land, that the owners of other tracts which were entitled to prorata shares of the excess distance on the ground over the measurement in the field notes were not necessary parties, since the judgment would not directly affect them, as it would not apportion the excess among all of the tracts, but would merely fix the location of the boundary line between the two tracts involved by the use of the apportionment rule of construction.

In Smith v Anderson (1921) 117 Wash 307, 201 P 1, an action between the owners to establish the boundary line between the northwest and the northeast quarters of a section in a township, in which action the commissioner appointed by the court to survey and mark the line found it necessary, in establishing the disputed boundary line, to determine

the proper location of the southwest and the northeast corner of the section, the court held that it was not necessary to bring in as parties to the action the owners of lands in the adjoining sections on the theory that a controversy might subsequently arise between them and the parties to the action as to the true location of the corners of the section in question. The court said that the owners of land in the other sections had no interest in the controversy before it and their presence was not necessary to its complete determination, that to bring them in as parties would introduce a new controversy which possibly would require other parties and result in an ever-widening circle involving all the landowners in the township, that the court had before it only the duty of properly locating the disputing boundary line, and that the parties immediately affected were the only necessary or proper parties.

In Cady v Kerr (1941) 11 Wash 2d 1, 118 P2d 182, 137 ALR 713, an action to establish the boundary between two adjacent parcels of land, owners of other lots which did not touch the boundary line in question were determined not to be necessary parties defendant to such action, even though their lots were originally part of a subdivided government lot which included one of such parcels, and were conveyed with specific reference to the line of such government lot which was the boundary line in dispute.

[c] Persons found not to be indispensable parties

In the following case involving the determination of a boundary line between adjacent tracts of land, the court decided that owners of other tracts were not indispensable parties, it appearing that their interests would not be affected by the determination of the line.

In Brateman v Upper Channel Site Co. (1964, Tex Civ App) 378 SW2d 882, error ref n r e, a suit in trespass to try title to recover title and possession of 1.1 feet by 50 feet of Lot No. 9, block 337, where defendants filed a cross action contending the strip involved was a part of Lot No. 8 of such block, the court, saying that the dispute involved the true southern boundary of Lot No. 9, which would be the northern boundary of Lot No. 8, and affirming judgment for plaintiff, held that the owners of adjoining lots 6 and 7 were not indispensable parties since this was not a suit seeking to allot an excess in the block, but was merely a suit to locate the boundary between property claimed by the parties to the suit. Since there was no plea in abatement seeking to have owners of other lots made parties, the court concluded that even if it could be said they were necessary parties, which point need not be passed on, there would be waiver by failure to file a plea in abatement.

§ 5. Party's grantor; prior owner

[a] Generally

The following case held that under the facts presented, the common grantor of the parties to a proceeding to establish boundary lines should be made a party to such proceedings.

In Smith v Johnson (1936) 209 NC 729, 184 SE 486, a special statutory proceeding to establish the boundary lines between the lands of plaintiff and defendant, the court held that the common grantor of the parties should be made a party to the proceeding. The court so ruled in view of defendant's allegations of mutual mistake in the drafting of the boundary line between the subject lands at the time of the simultaneous execu-

tion and delivery of deeds to plaintiff and defendant from their common grantor. The court called attention to a statute providing that in a special proceeding, a defendant may plead any equitable or other defense, and to another statute providing that all persons may be made defendants who are necessary parties to the complete determination of the question involved, and said that it was competent, therefore, for the defendant to plead the equitable relief of mutual mistake, and that the trial judge was authorized to make the common grantor a party defendant.

But the court in Rossi v Sophia (1931) 163 Wash 173, 300 P 522, held that the common grantor of the respective owners was neither a necessary nor a proper party to the determination of the boundary line between two adjacent lots in an action by one of the owners to enjoin the other from building a fence and further trespassing upon the strip of land in dispute, and for damages. The court emphasized that the deed wherein was described the boundary in question contained no ambiguity, either patent or latent.

◆

The following case held that under the circumstances a prior owner of one of 2 lots was not a necessary party to an action to establish the true boundary line between them.

Thus, the court in Cady v Kerr (1941) 11 Wash 2d 1, 118 P2d 182, 137 ALR 713, held that defendant in an action to establish a boundary was properly dismissed, where his answer in effect denied that he had any interest in the subject land either presently or at the time of the commencement of the action, it appearing that prior to the commencement of the action he had assigned his rights under a contract for the sale of the property, and had conveyed to another the property described thereunder.

[b] Plaintiff's grantor

Under the facts presented, the following cases each decided that plaintiff's grantor (warrantor) was not a necessary party to a suit the essential purpose of which was to ascertain a boundary line.[37]

The court in Barataria Land Co. v Louisiana Meadows Co. (1923) 154 La 461, 97 So 658, decided that plaintiff's grantors could not have been called as warrantors in a suit the only purpose of which was to establish a boundary line between adjoining properties owned by other persons. The court therefore concluded that plaintiff's grantors were not in any way bound by the judgment in the present suit to fix a boundary line, and had no interest of record which could be affected thereby.

In Hutchinson v Robinson (1951, La App) 52 So 2d 565, plaintiff, as

37. But see Blanc v Cousin (1853) 8 La Ann 71, revd on another point 60 US 202, 15 L Ed 601, wherein the plaintiff originally instituted an action of boundary against the defendant, who reconvened, alleging that he was the owner of the land claimed by plaintiff, and praying that he might be quieted in his title, and wherein the plaintiff answered the demand in reconvention, joined issue on the question of title, and called his immediate grantor in warranty, and wherein the previous grantors were successively called in to defend the suit, the court holding that the action was changed from an action of boundary to a petitory action by the defendant, and that, therefore, the plaintiff had the right to have his grantors in warranty cited as parties. An appeal from a judgment in plaintiff's favor was therefore dismissed upon the ground that the warrantors, being necessary parties, were not made parties in the appellate court.

the owner of a certain tract of land, brought the present action to fix the eastern boundary of his property, against defendant, the owner of land which adjoined plaintiff's on its eastern border, and also against plaintiff's vendor, who owned land nearby but not contiguous to that of plaintiff. Affirming dismissal of the action on other grounds, the court agreed with the defense argument that since lands belonging to plaintiff's vendor did not adjoin plaintiff's lands at any point, he had no right to make her a defendant in an action in boundary, whatever boundary he desired to establish, and that the mere fact that this particular defendant was plaintiff's vendor did not give him a right to make her a defendant in a boundary suit.

In Flowers v Germann (1941) 211 **Minn** 412, 1 NW2d 424, an ejectment action wherein the principal issue was whether plaintiffs or defendants were the owners of the disputed strip of land, the court held that as to these plaintiffs and defendants a substantial decree could be made even though such decree might not completely settle all questions which might be involved so as to conclude the rights of all persons who had an interest in the subject matter of the litigation. Hence, the court concluded that there was no defect of parties, and that plaintiffs' grantors were not "necessary parties," since their interests were consequential rather than direct, and since the rule that "necessary parties" are those without whom no decree can be effectively made determining the principal issues in the case does not extend to those who are only consequentially interested in the subject matter.

See Kish v Beruth Holding Corp. (1961) 66 NJ Super 149, 168 A2d 649, holding that where plaintiffs' predecessor in title was not made a party to proceedings instituted for the appointment of commissioners to determine plaintiffs' boundary line, the action taken by the commissioners fixing the line could not bind him or plaintiffs, his successors in title.

[c] Defendant's grantor

Under the facts presented, the following cases held that the determination of a boundary line dispute did not require the bringing in of the defendant's grantor as a party.

In Lentell v McBride (1936) 7 **Cal** 2d 263, 69 P2d 289, an action to quiet title which presented a boundary line dispute between adjoining landowners, the court, affirming judgment for plaintiffs, held that the determination of the controversy between plaintiffs and defendants did not require the bringing in of defendants' grantor or any other person as a necessary party, since said grantor, though a resident of the county, at no time sought to intervene in the action, nor did his wife, who was called as a witness upon the trial. Moreover, stated the court, defendants' suggestion that his grantor was a necessary party was apparently first made after the decision of the court below by means of objections to the proposed findings.

The court in Duplessis v Lastrapes (1845, **La**) 11 Rob 451, held that the defendant in a boundary action could not call in as a party his grantor in warranty, because the plaintiff did not seek to evict the defendant from any land sold to him, but only to contend that he had improperly changed his boundaries.

§ 6. Party's grantee; effect of conveyance, pendente lite

The following case held that under the circumstances, defendant's

grantee was a proper if not a necessary party in a suit to establish a disputed boundary line.

In Steele v McCurdy (1959) 269 Ala 271, 112 So 2d 336, an equitable suit to establish a disputed boundary line between the adjoining lands of the parties, plaintiff sought to amend the complaint by making the wife of the original defendant, who was defendant's grantee, a party respondent also. To defendant's argument that the court erred in denying the motion to strike the amendment because it worked a complete change of parties, it was said that the wife claimed under a quitclaim deed from her husband and was certainly a proper, if not a necessary, party to be brought in, and that bringing her in did not work a complete change of parties respondent in violation of the rule governing amendment.

See Vines v Sligh (1930) 221 Ala 181, 128 So 143, indicating that where, in a suit to establish a disputed boundary line, complainant's grantee was not made a party, in no manner could he be bound thereby.

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Where, in the following case, plaintiff landowner, pending outcome of a suit to determine boundaries to adjoining lands, conveyed his title to the disputed property, it was held that both plaintiff and his direct grantee were proper parties to the suit, and that the present owner of the property was a necessary party.

Thus, in Easterling v Cleckler (1959) 269 Ala 660, 115 So 2d 516, an equitable action to settle a boundary line dispute, wherein plaintiff and defendant were adjoining landowners, the court decided that where plaintiff, pendente lite, conveyed by warranty deed all of his title and interest in the disputed property, it was not improper for him to remain as a party to the suit for his own protection on account of his warranty of title in the deed, since he was by such fact interested in the successful prosecution of the suit. As to the direct grantee of the disputed property from plaintiff, the court found that he was unquestionably a proper party, but was not a necessary party because he had transferred his title. As to the present owner of the disputed property, the court held that while he was a necessary party to the suit since he succeeded to the title and possession of all the lands belonging to plaintiff, it was immaterial whether he was brought in as a party plaintiff or as a respondent.

§ 7. Remainderman or life tenant

The view has been taken that ordinarily, in an action or proceeding to establish a boundary line, a life tenant must have the remaindermen join with him as plaintiffs, or have them made defendants.

Thus, in Oliver v Irvin (1962) 105 Ga App 844, 125 SE2d 695, the court stated that while it is recognized that remaindermen are not joint tenants with the life tenant, they do, nevertheless, have such an interest in the estate in common with the life tenant that they are necessary parties to a processioning proceeding, and should be joined either as applicants or as defendants so that they will be bound by any judgment ultimately entered in the case, and that this is so because a statute provides that every landowner who desires the lines around his entire tract to be surveyed and marked anew is to apply to the processioners to appoint a day when a majority of them, with the county surveyor, will trace and mark such lines. It was further pointed out that a vested remainderman in lands has a present estate or interest therein which has

the character of absolute ownership, and that although the enjoyment of the interest is postponed to the future, it is, nevertheless, a present interest which may be sold by conveyance, devised by will, or levied on and sold under process.

The court in Collier v Hiden (1917) 120 Va 453, 91 SE 630, held that a life tenant must either have the remaindermen join with him as plaintiffs, or have them made defendants, in an action to establish a boundary line, under a statute providing that any person having an interest in real estate upon petition filed in the court which would have jurisdiction in an action of ejectment concerning such real estate, shall have the right to have ascertained and designated by such court the true boundary line or lines of such real estate as to one or more of the coterminous landowners, that all persons interested in the coterminous real estate shall be made parties to the petition which shall be matured for hearing as provided for maturing an action of ejectment, and that the judgment shall forever settle the true boundary line in question, and be binding upon the parties, their heirs, devisees, and assigns.

See Watkins v Childs (1907) 80 Vt 99, 66 A 805, wherein it was indicated that before a court of equity will act in a suit brought to determine confused boundaries, all persons interested, whether their estates are present or future, must be made parties.[38]

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Where a life tenant sues to establish a boundary line and dies while the case is pending, the remaindermen are properly substituted in his place.

Thus, in McCool v Wilcher (1921) 27 Ga App 96, 107 SE 365, a proceeding to establish boundaries brought by one who owned a life estate in the subject tract of land, where the life tenant died while the case was pending, the court held that it was not error to substitute the remaindermen in place of the life tenant. It was concluded that on the death of the applicant who owned the land as life tenant, the remaindermen were necessary parties, and that to substitute them for parties did not create a new, separate, and distinct cause of action.

◆

The following case held that a petition in a boundary line suit was not defective although only the life tenant and not also the remaindermen was named as defendant.

Hale v Arms (1923) 137 Va 167, 119 SE 94, reh den 137 Va 177, 121 SE 269, was a suit to establish boundary lines brought under a statute requiring that the petitioner name as defendant any person having a "present interest" in the boundary line sought to be ascertained. Holding that the petition was not wholly defective although only the life tenant was named as defendant, and not also the life tenant's wife and children, the court reasoned that it was able to establish the boundary lines in controversy so far as the defendant life tenant was concerned, even though the wife and children were not parties. The court said that since the life tenant certainly had a "present inter-

38. The court in Watkins v Childs (Vt), supra, held that a demurrer upon the ground of lack of parties, not limited to the part of the bill which seeks the establishment of one boundary line as to which interested parties are not joined, but made to the whole bill which also asks for the establishment of another boundary line as to which the parties are complete, must fail.

est," and since he was before the court, it had jurisdiction to establish such line as against him, and that, furthermore, the failure of the petition to make the remaindermen parties defendant was the fault of the plaintiff of which he could not complain on the present petition for rehearing.

§ 8. Owner within tract formed by accretion

The following case held that in a suit to establish the location of boundary lines within a tract of land conceded to have been formed by accretion,[39] all landowners who were entitled to share in the accretion land were indispensable parties.

Kapp v Hansen (1962) 79 SD 279, 111 NW2d 333, was a proceeding to establish interior boundary lines and quiet the title to a large tract of land conceded to be accretive and formed in an area where a river moved from its original course. The parties were the owners of the meandered lands situated in one particular section. The court held that the judgment from which defendant appealed should be reversed and the matter remanded for inclusion of owners of meandered lands situated in various other sections adjoining plaintiff's land. The court found that these other landowners were indispensable parties since they were indisputably shown by the record to be prima facie entitled to share in the apportionment of the accretion land herein involved. It was explained that if the accretion land was apportioned only among the present parties to the suit, the owners of meandered lands in other sections would be virtually excluded from sharing in the accretion land and would also be cut off from access to the water.

39. Accretion as affecting boundaries, generally, is discussed in 78 Am Jur 2d, Waters §§ 406–427.

§ 9. Mortgagee of adjoining tract

The following case held that in a suit to settle a disputed boundary, the mortgagee of one of the adjoining tracts was a necessary party.

In Rollan v Posey (1961) 271 Ala 640, 126 So 2d 464, an equitable action between adjoining landowners to establish a boundary line, on appeal from an adverse decree defendants argued for a reversal because plaintiffs' land was subject to an outstanding and unpaid mortgage and the mortgagee was not made a party to the suit. Apparently, nonjoinder of the mortgagee was objected to for the first time on appeal. Noting a series of rules to the effect that in an equity court all persons having a material interest, legal or equitable, in the subject matter of the suit, must be made parties, either as plaintiffs or defendants, the court said it was of opinion that under such rules, the mortgagee is such a necessary or indispensable party as that final decree ought not to be rendered in a suit to settle a disputed boundary without making the mortgagee a party to the suit. The court noted earlier cases wherein it was held that in a suit to settle a disputed boundary, the court must have before it title to the property which is sought to be affected by the decree, and that in a boundary suit necessary parties include all persons who have a direct interest in the result of the proceedings, such as tenants in common, remaindermen, and reversioners. For the omission of the mortgagee as a party, the court said that the decree must therefore be reversed and the cause remanded.

Additional cases which hold that in

a suit to settle a disputed boundary to adjoining tracts of land, a mortgagee of one of the tracts ought to be made a party, include Bryan v W. T. Smith Lumber Co. (1965) 278 Ala 538, 179 So 2d 287, and Knotts v Knotts (1939) 191 SC 253, 1 SE2d 809.

§ 10. Owner's wife who has dower right in tract

The following case held that defendant's wife was not a necessary party to a suit brought to determine the boundary between adjoining lands, where her only interest in defendant's land was an inchoate right of dower.

Sypolt v Shaffer (1947) 130 W Va 310, 43 SE2d 235, was a summary proceeding brought pursuant to statute to locate the true boundary lines between the property of coterminous owners. Saying that the statute required all persons having a present interest in the boundary line or lines sought to be ascertained and designated to be made parties to the proceeding, the court found that the wife of the defendant, whose only interest in the coterminous land of defendant was an inchoate right of dower therein, had no "present interest" in the boundary line sought to be ascertained within the meaning of the statute and therefore was not a necessary party to a proceeding under the statute, and that therefore the trial court was correct in overruling this ground of demurrer. Saying that the present proceeding was instituted to locate a common boundary as between the plaintiff and the defendant and not to try title, and that boundary lines can be established in a number of different ways and do not require the participation of persons having a conditional or inchoate interest in the land involved, the court concluded that the wife was not a necessary party to the proceeding since she was vested with no property right directly concerned, and that since the statute under consideration did not expressly make her a necessary party, it did not constitute error to proceed against the owner of the fee alone.

III. Particular parties plaintiff

§ 11. Generally; misjoinder

In a suit to ascertain a boundary line, the owner of land bounded by the line to be ascertained is a necessary party[40] and may, under statute, bring such a suit,[41] as may anyone who possesses the land as owner.[42] To qualify as a proper party plaintiff to prosecute a suit to establish a boundary line, one must own lands adjoining defendant's lands.[43] In some

40. § 3[a], supra.

41. See, for instance, Cady v Kerr (1941) 11 Wash 2d 1, 118 P2d 182, 137 ALR 713, holding that the word "proprietor" imports legal right or exclusive title to the land, that is, ownership, when used in a statute providing that one or more of the proprietors of adjoining lands may bring an action to establish the boundaries between them.

Within a statute giving any person who has an interest in real estate the right to petition a court which would have jurisdiction of an ejectment action, to ascertain and designate the true boundary line as to coterminous landowners, the obvious conclusion, on demurrer, that a petitioner alleging a fee simple interest had a sufficient interest to institute an action to establish the boundary of his land was reached in Christian v Bulbeck (1916) 120 Va 74, 90 SE 661.

42. Sprigg v Hooper (1844, La) 9 Rob 248; Cady v Kerr (1941) 11 Wash 2d 1, 118 P2d 182, 137 ALR 713.

43. Illustrative of the many cases which support this rule are the following: Vines v Sligh (1930) 221 Ala 181, 128 So 143; Branyon v Kirk (1939) 238 Ala 321, 191

jurisdictions, statutes require that actions to resolve boundary line disputes will lie only where the plaintiff and defendant are "coterminous owners."[44] Under such a statute, it has been held that the relation of the owner of the surface of one tract of land and the owner of the mineral rights under an adjacent tract of land was not that of coterminous landowners, so that neither could bring an action to establish the true boundary line.[45]

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An objection that there is a misjoinder of parties is an objection that persons have been made parties of record to the action who are neither proper nor necessary parties thereto.[46] Such an objection has been sustained where the respective owners of two lots, neither of which had any interest in the other's lot, brought a proceeding to establish the boundary line between such lots and another lot.[47] Such an objection has also been sustained where one of the use plaintiffs had no interest in the disputed boundary line.[48] On the other hand, it has been held that there was no misjoinder of parties plaintiff in a suit to determine a boundary where each such plaintiff owned separate interests in land but claimed the same line to be the true boundary;[49] nor was there a misjoinder of parties plaintiff in a suit to establish the corners of a section of land where each such plaintiff owned land within the section.[50]

So 345 (advising that alleged ownership of only the disputed strip of land did not make one an adjoining landowner so as to entitle him to bring a suit in equity to establish a boundary line between adjoining lands); Dorkins v Montgomery (1925) 2 La App 292 (holding that one cannot maintain an action to establish a boundary where it appears that he and the defendant are not adjacent landowners).

44. For instance, see Elliott v Lenoir (1955) 263 Ala 73, 81 So 2d 274; Walls v Bennett (1959) 268 Ala 683, 110 So 2d 277; Williams v Davis (1967) 280 Ala 631, 197 So 2d 285.

45. Buchanan Cole Co. v Street (1940) 175 Va 531, 9 SE2d 339.

46. See 59 Am Jur 2d, Parties § 273.

47. Rogers v Rogers (1926) 192 NC 50, 133 SE 184.

48. In Birmingham v Griffin (1875) 42 Tex 147, plaintiff brought suit in his own name for the use of his sons, to establish a boundary line between the lands of plaintiff and the lands of another. Plaintiff's sons became parties by supplemental petition which showed that when the suit was commenced only one of the sons was interested in the disputed lands, from the uncertainty of the division line. Saying that although the prayer was for a joint judgment, the petition on its face showed that only one of the petitioners was interested in the matter in controversy, and that the other petitioner was an improper party to the suit, the court found, therefore, no error in sustaining the exception to the supplemental as well as the original petition, on account of misjoinder of parties plaintiff.

49. In Texas Co. v Van Deventer (1926, Tex Civ App) 290 SW 560, error dismd w o j, in which the only issue involved was one of boundary, the correct location of which depended upon the same evidence on the part of both plaintiffs, who each owned a tract of land in which the other had no interest after the conveyance by warranty deed by one of part of his land to the other, it was held that there was not a misjoinder of parties plaintiff, where each of them claimed the same line on one side of the defendant's land to be the true boundary between the latter's land and their respective tracts.

50. In proceedings to establish the corners of a section of land, it was unsuccessfully contended in Rollins v Davidson (1892) 84 Iowa 237, 50 NW 1061, that there was a misjoinder of parties plaintiff, in that some of the plaintiffs had no

Where plaintiff sued to establish the boundary to land which he had leased to another, there was not a misjoinder of parties because plaintiff failed to make his lessee a party to the suit.[51]

§ 12. Owner who conveys all or part of tract

One of the respective owners of two adjoining tracts of land is not the proper party plaintiff to bring a suit in equity to establish the boundary between such tracts, where shortly before bringing suit he conveyed the part of his land adjacent to the other tract.[52] An adjoining owner who conveys his land after filing a suit in equity to establish its boundary line cannot thereafter prosecute the suit for want of interest, but his grantee can proceed by an original bill in the nature of a supplemental bill, or by an amendment.[53] However, the owner of one of two adjacent lots who sold and conveyed his lot to another about the time he filed the action may maintain against the owner of the other lot an action of ejectment, in which the sole issue is the boundary line between the two lots, where, by the terms of the sale, he agreed to prosecute the action and, if successful, to turn the land over to the grantee, but, if unsuccessful, to be responsible for it.[54]

§ 13. Cotenants and part owners

A suit for the determination of the boundary line between two adjacent parcels of land may be brought by a part owner of one of the lots,[55] or by a husband without joinder of his wife although the couple owns one of the adjacent parcels as tenants by the entireties.[56] Moreover, a tenant in common in possession of land and entitled to possession of the whole has the right to maintain an action against the owner of adjoining land to establish the boundary line between them.[57]

◆

The owner of an undivided interest in land who is the legal usufructuary of the remaining interest can properly

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interest in the southwest corner, and others no interest in the northwest corner, the court saying that all owners of land within the section were interested in its four corners, and that, even if parties were joined as plaintiffs who had no interest, that was no reason why the rights of those having an interest might not be adjudicated.

51. Powe v Merkel (1960) 270 Ala 688, 121 So 2d 865.

52. Vines v Sligh (1930) 221 Ala 181, 128 So 143.

53. Branyon v Kirk (1939) 238 Ala 321, 191 So 345.

But in an action in equity for an injunctional decree restraining an adjoining owner from interfering with plaintiff's possession, involving the boundary line, where, when the controversy as to the line arose, one who had purchased the plaintiff's land and made a partial payment therefor surrendered his conveyance back to the plaintiff, it was held in Amber v Cain (1907, Iowa) 110 NW 1053, that the plaintiff had the right to bring the action, as against an objection that he was not the proper party plaintiff, the court stating that, moreover, the plaintiff's grantee came into the action setting up his interest and joined the plaintiff in the relief demanded by the latter.

54. Kelton v Saylor (1925) 211 Ky 739, 277 SW 1026.

55. Cady v Kerr (1941) 11 Wash 2d 1, 118 P2d 182, 137 ALR 713.

56. See Nesbitt v Fairview Farms, Inc. (1954) 239 NC 481, 80 SE2d 472, supra § 3[b].

57. Cushing v Miller (1883) 62 NH 517 (ovrld on another point Dame v Fernald, 86 NH 468, 171 A 369).

bring a suit to ascertain the line between such land and an adjacent tract.

Thus, in Randazzo v Lucas (1958, La App) 106 So 2d 490, an action to fix the boundaries between adjoining city lots referred to as lots "K" and "L," the court held that plaintiff who had acquired lot "K" during the regime of the community of acquets and gains existing between himself and his now deceased wife could maintain the present action alone, since he was the owner of an undivided one-half of the property as surviving husband and the legal usufructuary of the share of the decedent which devolved to the children of the marriage. The court based its decision on a civil code provision that an action in boundary may be instituted not only by the owner but by any person who possesses as owner, or by the usufructuary; the court also referred to Deshotels v Guillory (1935, La App) 161 So 217, reh den (La App) 162 So 652, which decided that the owner of an undivided three-fourths and the usufructuary of the other fourth interest in a tract of land could bring an action to establish the boundary line between such tract and adjoining and contiguous tracts.

§ 14. Heir of decedent owner

Heirs of a decedent landowner have been held to be proper party plaintiffs in a suit to establish boundaries to the land.

Thus, in Randazzo v Lucas (1958, La App) 106 So 2d 490, an action to fix the boundaries between adjoining city lots referred to as lots "K" and "L," where lot "K" was acquired by plaintiff during the regime of the community of acquets and gains existing between himself and his now deceased wife, and where the coplaintiffs were the children of the marriage and as such were the decedent's only heirs, and where affidavits showed that the decedent had never adopted anyone nor was she herself ever adopted, the court held that there was a sufficient showing of heirship to allow the heirs to appear as coplaintiffs in this suit. Recognizing that the case might have been different had the defendants denied that the children were the heirs of the decedent, the court said that the defendants made no such denial and were only contending, as a foundation for their exceptions, that before the children could appear they must have been recognized in a court of probate and sent into possession of the property by formal judgment. The settled law was said to be that an heir can sue directly without having been recognized by the probate court when he can prove his heirship and right to recover the property as heir.

And a woman having an interest in land of her deceased husband by inheritance, and in actual possession thereof as her homestead, was held to have sufficient title to maintain a suit in the form of trespass to try title involving a boundary question, in Turnbow v Richardson (1941, Tex Civ App) 149 SW2d 616, error dismd, the court saying that a tenant in common may maintain an action to recover the whole of the land from one having no title.

§ 15. Vendor or vendee in executory contract of sale

The vendee in a forfeitable executory contract of sale, at least if it has not been substantially performed so as to reduce the vendor's interest to a bare legal title, cannot bring an action to establish the boundary line between his lot and the adjoining lot without joining his vendor as party plaintiff therein. See Cady v Kerr

(1941) 11 Wash 2d 1, 118 P2d 182, 137 ALR 713, holding also that such a vendee is not a "proprietor" within the meaning of a statute providing that whenever the boundaries of land between two or more adjoining proprietors shall have been lost, or become obscure or uncertain, one or more of such adjoining proprietors may bring an action to have such boundaries established, and providing that the costs, apportioned equitably, shall be a lien upon the lands.

IV. Particular parties defendant

§ 16. Generally

As already discussed, in a suit to ascertain the boundaries to adjoining lands, owners of lands as are bounded by the disputed line are necessary parties.[58] The following cases held specifically that under the particular facts presented, failure to make such an adjoining landowner a party defendant to boundary line litigation was reason for dismissal of the action or reversal of the judgment below.

Thus, in Hutchinson v Robinson (1951, La App) 52 So 2d 565, plaintiff, as the owner of a certain tract of land, brought the present action to fix the eastern boundary of his property, against defendant, the owner of land which adjoined plaintiff's on its eastern border, and also against plaintiff's vendor. The court noted that plaintiff's entire petition was based on the contention that, in fixing the eastern boundary, the western boundary must first be established, and that the western boundary had been established by prescription, and that while plaintiff asked for the fixing of the western boundary, he did not make his neighbors on that side parties. The court therefore affirmed dismissal of the action for the reason that persons whose property would be affected by the judgment were not made defendants.

See Trunnell v Tonole (1922) 104 Or 628, 208 P 583, where, after the grantee of part of a tract of land had erected his house principally upon the remaining land of the grantor, such grantee secured a mortgage representing the house to be wholly upon his own land, and the mortgagee, having bid in the property at its foreclosure sale, brought an action to obtain a decree adjudging that the house was a part of the property covered by the mortgage. It was stated that if the question presented had been one of disputed boundary, the mortgagor and the owner of the adjoining land might have been made parties defendant.

In Robinson v Allen (1956, La App) 88 So 2d 64, the owners of certain city lots sued to have a judicial fixing of the boundary between their respective properties and a certain adjoining lot "K." The matter proceeded to trial on the assumption that the particular named defendant owned lot "K" and was the proper defendant, and, ultimately, there was a judgment which established the boundary. On appeal, the court found that lot "K" was the separate property of defendant's wife and was never owned by defendant, and that the case should therefore be reversed and remanded in order to make the proper party a defendant, and for a retrial. Saying that while the owner of an estate has the right to compel a fixation of boundaries between his estate and contiguous property, the law contemplates that the action to fix the limits shall be brought against the

58. § 3[a], supra.

owner of the other estate, the court concluded that plaintiffs were in error in impleading the husband as the defendant, and that no adjudication by the court on the record in its present shape could affect the property.

See Dudley v Meyers (1970, CA3 VI) 422 F2d 1389, an action to remove cloud on title, wherein the court held that since owners of land bounded by disputed lines were not made parties defendant to an earlier quiet title proceeding, the court, then, in the earlier proceeding, had no power to determine the disputed boundary question. Saying that "due process of law calls for no less," the court believed it to be clear that the earlier proceeding which had been brought against "all persons owning or claiming an interest" in a certain tract of land was not an appropriate vehicle for the litigation of the boundary question even if it had brought that question into focus, which it did not.

◆

A suit to determine a boundary should be brought against the corporation which owns the land bounded by the disputed line, and not against the individual who controls the corporation.

Thus, the court in Finley v Kanter (1950) 256 Ala 103, 53 So 2d 347, held, as to the aspect of a bill seeking to establish a boundary line, that the named individual defendant was an improper party, since the bill showed on its face that a corporation and not the individual defendant was the owner of the tract of land adjoining plaintiff's land. The court, while noting that the corporation was controlled by the individual defendant, applied the rule that a corporation is a legal entity which is separate and distinct from its shareholders and officers, and that the property representing the capital of the corporation is vested in and owned by the corporation. The court explained that under this rule the individual defendant had no interest in the property involved nor in the boundary line.

§ 17. Persons claiming adversely to plaintiff

The following case held that an owner who was in doubt as to the true boundary line of his property on each side could bring into the action as defendants all parties claiming adversely to him, in order to have the matter settled in one adjudication.

In a suit in form one of trespass to try title, but whose real purpose was to fix and determine the boundary lines of the plaintiff's land adjoining that of one of the defendants on the one side and adjoining that of the other defendant on the opposite side, it was held in Muncy v Mattfield (1897, Tex Civ App) 40 SW 345, that the plaintiff had the right to determine in one suit both boundary lines, although the lands of the defendants did not adjoin each other, and each had no interest in the other's land, and the court said that the practice was permissible, because the plaintiff was in doubt as to where were the true boundary lines of his land on each side, and had the right to settle the controversy in one suit by bringing into such suit all parties who might be claiming adversely to him.

See Hill v Kerr (1939) 277 Ky 105, 125 SW2d 1005, an action to recover land wherein there arose a boundary dispute. Plaintiff alleged that the owners of separate land parcels adjoining his each claimed about one-half acre of plaintiff's land. Each defendant filed a separate answer. Saying it appeared that there was no connection between plaintiff's claim of title

against the land of the first defendant and that against the land of the second defendant, and that plaintiff's claims represented entirely separate controversies unrelated to one another, the court decided that even if the defendants had been misjoined in the one action, since no objection was raised before making a defense, the defendants' failure to make such an objection at a proper time operated as a waiver.

§ 18. Lessees of various interests in land

It has been held that a landowner cannot maintain a boundary action against the lessee of an adjoining tract.

Thus, in Knoll v Yoder (1968, La App) 213 So 2d 114, an action to fix the boundary between two contiguous estates, where plaintiffs were the owners in indivision of one estate and defendants were the owners of the other estate and their lessee, the court, referring to codal articles whereunder it was said to be clear that the lessee is not an owner of the property, does not possess as owner, and actually is expressly prohibited from bringing a boundary action, determined that although the codal articles do not expressly state that a boundary action cannot be brought against a lessee, the court believed that the articles clearly contemplate that it cannot. Saying that no extrajudicial agreement signed by the lessee could establish the boundary line and that no judgment against him would be of any effect in fixing the line, and that it would therefore be useless to name the lessee as a defendant, the court regarded as immaterial for present purposes the fact that the lessee had deliberately destroyed the old existing boundary line and had refused to allow plaintiffs' surveyor to go on the land and amicably reestablish the boundary line.

◆

The following case found that plaintiff's tenant was "interested in adjoining land" for purposes of a statute permitting suit to establish a boundary against a person so interested.

Where defendant had entered on the disputed lot as tenant of plaintiff and had in effect ousted plaintiff and thereafter remained in actual occupancy, and in the present suit insisted that he acquired title by deed from the board of education on which conveyance he rested title now claimed for his wife, the court in Steele v McCurdy (1959) 269 Ala 271, 112 So 2d 336, an equitable suit to establish a disputed boundary line, held that, in these circumstances, defendant was "interested in adjoining land," as that phrase is used in a statute permitting suit against the owner or person interested in adjoining land, to have the boundary lines established.

◆

The following case held that under the facts presented, in a suit between owners of the mineral interests of adjacent land to settle the boundary, one who extracted ore under respective leases from each such owner was a proper and necessary party defendant.

Where a dispute arose between the owner of the minerals upon one lot and the owner of the minerals upon the adjacent lot as to the location of the boundary line which separated the two lots, and a third party under respective leases from such owners was extracting the ore upon both lots at a royalty of a larger amount from one than from the other, and deposited in a bank the royalities for the ore extracted from the disputed area,

it was held in Georgia Peruvian Ochre Co. v Cherokee Ochre Co. (1921) 152 Ga 150, 108 SE 609, that the lessee was a proper and necessary party defendant to an action by one of the minerals owners to establish the boundary line, to recover the money on deposit in the bank, and for an accounting by the lessee as to the ore extracted in the disputed area. The court said that the lessee was interested adversely to the plaintiff in the result of the suit, because if such ore belonged to the plaintiff, the lessee was liable at a larger rate per ton.

§ 19. Owner of land adjudicated to state for nonpayment of taxes

The following case permitted a boundary action to be brought against a defendant even though her land had been adjudicated to the state and city for nonpayment of taxes.

In New Orleans & N.E.R. Co. v Redmann (1946, La App) 28 So 2d 303, an action to fix a boundary between two adjacent city lots was held to be maintainable against the defendant as record title owner of property adjoining plaintiff's, even though defendant's land had been adjudicated to the state and city for nonpayment of taxes. The court said that the tax adjudication did not wholly divest defendant of ownership as she retained the right to redeem the property as long as the inchoate legal title remained in either the state or the city, and that the adjudication did not, ipso facto, have the effect of ousting her of possession or deprive her of holding as owner.

Consult POCKET PART in this volume for later cases