A brother and sister were jointly in possession of land in fee simple as tenants in common. They joined in a mortgage of the land to a bank. The brother erected a fence along what he considered to be the true boundary between the land and the adjoining property, owned by the neighbor. Shortly thereafter, the brother had an argument with the sister and gave up his possession of the land. The debt secured by the mortgage had not been paid.

The neighbor surveyed his land and found that the fence erected a year earlier by the brother did not follow the true boundary. Part of the fence was within the brother and sister's land. Part of the fence encroached on the neighbor's land. The neighbor and the sister executed an agreement fixing the boundary line in accordance with the fence constructed by the brother. The agreement, which met all the formalities required in the jurisdiction, was promptly and properly recorded.

A year after the agreement was recorded, the brother temporarily reconciled his differences with the sister and resumed joint possession of the land. Thereafter, the brother repudiated the boundary-line agreement and brought an appropriate action against the neighbor and the sister to quiet title along the original true boundary.

In such action, will the brother prevail?

A. No, because the agreement, as a matter of law, was mutually beneficial to the brother and sister.

B. No, because the sister was in sole possession of the land at the time the agreement was signed.

C. Yes, because one tenant in common cannot bind another tenant in common to a boundary-line agreement.

D. Yes, because the bank was not a party to the agreement.

Explanation:

Consent between cotenants in common

(common examples)

Consent required	Convey entire co-owned property
	Obtain exclusive possession over part of property
	Bind other cotenants' interests in contract with third party
No consent required	Sell, lease, or devise personal ownership interest
	Possess entire co-owned property
	Extract minerals from co-owned property (unless committing waste)

Tenancy in common is concurrent ownership of land where each co-tenant has a share of the property but an equal right to possess the whole property (ie, separate but undivided interests). A co-tenant **may transfer his/her own interest** without the other co-tenants' consent. However, a co-tenant **cannot transfer other co-tenants' interests** or **bind them under a contract** affecting the property (eg, a boundary-line agreement).

Here, the brother and sister share the land in fee simple as tenants in common. The sister and the neighbor executed a contract fixing the boundary line in accordance with a fence erected by the brother. Although the brother was not in possession of the land at the time the agreement was signed, he was still a co-tenant **(Choice B)**. Therefore, the sister could not bind him to that agreement, and he will likely prevail.

(Choice A) When a contract is mutually beneficial to all co-tenants, it is presumed that they have all ratified (ie, confirmed or accepted) the contract. And though ratification renders an otherwise invalid contract valid, a presumed ratification is rebutted when a co-tenant repudiates the agreement (as seen here).

(Choice D) Under the lien theory of mortgages (majority rule), a lender has a security interest—but not title—in the mortgaged property. Therefore, the fact that the bank was not a party to the boundary-line agreement does not render it unenforceable against the brother. Instead, the brother is not bound because *he* was not a party.

Educational objective:

Although a tenant in common may freely transfer his/her interest to a third party, that tenant cannot transfer another co-tenant's interest or bind another co-tenant to a contract affecting the shared property.

References

20 Am. Jur. 2d Cotenancy and Joint Ownership § 93 (2018) (ability to bind other co-tenants).