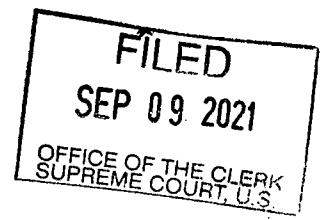


ORIGINAL

No. 21-530

IN THE
SUPREME COURT OF THE UNITED STATES



THOMAS C. DONALD

Petitioner

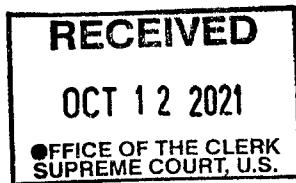
v.

JAMES P. KIMBERLEY & CAROL J. KIMBERLEY
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When the United States conveys ownership of public land to a person, it does so with a land patent in which the conveyed land is described by the Section in which it lies. The location of the Section is defined by the last survey of the land, in accordance with Title 43 U.S.C. § 752, conducted while the land is still public land. This statute states, in part, that:

“The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned, shall be held and considered as the true length thereof.”

Is it a violation of Title 43 U.S.C. § 752 for the location of the boundary of a Section of land to be changed from the location according to the “Official Plat of the Survey of the Land returned to the General Land Office by the Surveyor General”, as stated in the patent of the land granted by the United States, to a different location established by the Judicial System of Alabama?

Title 43 U.S.C. § 752 is binding upon the Judicial System of Alabama by the Supremacy Clause (ArtVI.C2.1.1.1) and by the Due Process Clause (U.S. Const. amend. XIV, § 1) and by decisions of the Federal Courts. This is a fundamental question in real property law in the United States.

PARTIES TO THE PROCEEDINGS

The petitioner is Thomas C. Donald (“Donald”), who was the plaintiff at the trial court level in the Circuit Court of DeKalb County, Alabama, the appellant in the Alabama Court of Civil Appeals, and the petitioner in the Supreme Court of Alabama.

The respondents are James P. Kimberley and Carol J. Kimberley (“the Kimberleys”), who were the defendants at the trial court level in the Circuit Court of DeKalb County, Alabama, the appellees in the Alabama Court of Civil Appeals, and the respondents in the Supreme Court of Alabama.

The proceedings involving these parties in each court are described on the next page (iii).

STATEMENT OF RELATED PROCEEDINGS

In the Circuit Court of DeKalb County, Alabama, case 28-CV-2017-900198, captioned Thomas C. Donald v. James P. Kimberley and Carol J. Kimberley, judgment was entered on June 21, 2018, and was restated on August 9, 2018, moving a Section boundary line from the location defined by an 1839-40 survey conducted under the authority of Title 43 U.S.C. § 752 which states that, “The boundary lines, actually run and marked in the surveys ... shall be established as the proper boundary lines of the sections ...” In breach of the warranty made by the United States government on the location of the Section boundary line in its land patent, Donald was deprived of property and the boundaries of nearby parcels of land were altered.

In the Alabama Court of Civil Appeals, case 2190017, captioned Thomas C. Donald v. James P. Kimberley and Carol J. Kimberley (Appeal from DeKalb Circuit Court CV-17-900198), the judgment of the Circuit Court was affirmed without an opinion on September 11, 2020. An Application for Rehearing was overruled without an opinion on January 8, 2021.

In the Supreme Court of Alabama, case 1200245, captioned Ex parte Thomas C. Donald. Petition for a Writ of Certiorari to the Court of Civil Appeals (In re: Thomas C. Donald v. James P. Kimberley and Carol J. Kimberley) (DeKalb Circuit Court: CV-17-900198; Civil Appeals: 2190017), Donald’s petition for a writ of certiorari was denied without an opinion on July 9, 2021, with five of nine justices concurring.

TABLE OF CONTENTS

Question Presented for Review	i
Parties to the Proceedings	ii
Statement of Related Proceedings	iii
Table of Contents	iv
Items in the Appendices	v
Table of Cited Authorities	vi
Petition for a Writ of Certiorari	1
Opinions Below	1
The Basis for Jurisdiction	2
Constitutional Provisions and Statutes	3
Statement of the Case	6
Section Line Law and Judicial Proceedings. . .	6
The Moving of the Section Line	12
Argument	16
Conclusion	17

ITEMS IN THE APPENDICES

Opinions, Orders, Findings, Conclusions	A1
Order of June 21, 2018	A3
Order of August 9, 2018	A8
Final Order	A11
Affirmation of Trial Court Judgment	A17
Application For Rehearing Overruled	A18
Denial of Writ of Certiorari	A20
The Public Land Survey System	A22
Brief re Section Lines	A25
Motion to Reconsider	A35
Motion to Reconsider Orders Moving Line	A43
Appellant's Brief	A47
Petition for Writ of Certiorari	A54

TABLE OF CITED AUTHORITIES

<i>Cragin v. Powell</i> , 128 U.S. 691 (1888)	11
<i>Dumas v. United States Department of the Interior</i> , 2005 WL 608276, No. CV 04-489-KI, March 16, 2005.	11
<i>First Beat Entertainment, L.L.C. v. ECC, L.L.C.</i> , 962 So.2d 266 (Ala.Civ.App. 2007)	10
<i>Lane v. Darlington</i> , 249 U.S. 331 (1919)	11
<i>United States v. Estate of St. Clair</i> , 2016, 819 F.3d 1254, United States Court of Appeals, Tenth Circuit . . .	6
<i>United States v. Reimann</i> , 504 F.2d 135, 138 (10 th Cir.1974)	11
<i>United States v. Stone</i> , 69 U.S. (2 Wall.) 525, 17 L.Ed. 765 (1864)	7

STATUTES AND CONSTITUTION

Title 28 U.S.C. § 1257	2, 4
Title 43 U.S.C. § 752	
. i, iii, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17	
<i>Supremacy Clause</i> (ArtVI.C2.1.1.1).	i, 5
<i>Due Process Clause</i> (U.S. Const. amend. XIV, § 1)	i, 5

PETITION FOR A WRIT OF CERTIORARI

Thomas C. Donald (“Donald”) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in case 1200245.

OPINIONS BELOW

The orders entered by the Circuit Court of DeKalb County, Alabama, in case no. 28-CV-2017-900198 have not been published. Initial orders were entered on June 21, 2018, and on August 9, 2018, and a final order was entered on September 30, 2019. Copies of the initial orders are included in the Appendix beginning on pages A3 and A8. The final order, included beginning of page A11, did not relate to the question presented for review in this petition.

The orders entered by the Alabama Court of Civil Appeals in case no. 2190017 have not been published. Orders were entered on September 17, 2020, and on January 8, 2021. Copies of these orders are included in the Appendix beginning on page A17.

The order entered by the Supreme Court of Alabama in case no. 1200245 has not been published. The order was entered on July 9, 2021. A copy of this order is included in the Appendix beginning on page A20.

The last day for filing this petition was extended to November 13, 2021, by a letter from the Clerk’s Office on September 15, 2021.

THE BASIS FOR JURISDICTION

The Supreme Court of the United States has jurisdiction under Title 28 U.S.C. § 1257 because the highest court in Alabama has rendered a final judgment which is contrary to Title 43 U.S.C. § 752 and which, therefore, draws in question the validity of this fundamental statute of the United States.

Title 28 U.S.C. § 1257 states that, "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question ..."

The Supreme Court of Alabama, in case 1200245, let stand an order by the Circuit Court of DeKalb County, Alabama, which declared that the boundary line of a section of land which was run and marked in a survey during 1839-40, under the authority of the Secretary of the Interior and Title 43 U.S.C. § 752, was incorrect, and a new boundary was declared. Title 43 U.S.C. § 752, however, states that, "The boundary lines, actually run and marked in the surveys ... shall be established as the proper boundary lines of the sections." Donald was deprived of property as a result of the order by the Circuit Court, and the boundaries of nearby properties were modified.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 43 U.S.C. § 752

The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:

First. All the corners marked in the surveys, returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half- and quarter-sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

Second. The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned, shall be held and considered as the true length thereof. And the boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners

have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the watercourse, Indian boundary line, or other external boundary of such fractional township.

Third. Each section or subdivision of section, the contents whereof have been returned by the Secretary of the Interior or such agency as he may designate, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part.

Title 28 U.S.C. § 1257

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or

any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

The Supremacy Clause

Article VI of the U.S. Constitution, ArtVI.C2.1.1.1, states that:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The Due Process Clause

The Fourteenth Amendment, U.S. Const. amend. XIV, § 1, states that:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law".

STATEMENT OF THE CASE

Section Line Law and Judicial Proceedings

The Honorable Randall L. Cole issued an order in the Circuit Court of DeKalb County, Alabama, in case 28-CV-2017-100198, on June 21, 2018, which declared a new location for the North boundary (a “Section line” in the Public Land Survey System) of Section 26, Township 5 South, Range 10 East, Land District of North Alabama, Huntsville Meridian.

The Public Land Survey System is described in the Appendix beginning on page A22 in a quote from *United States v. Estate of St. Clair*, 2016, 819 F.3d 1254, at page 1256, United States Court of Appeals, Tenth Circuit. This description cites Title 43 U.S.C. § 752 on which the survey system is based. This statute established a procedure for describing the locations of parcels of land in land patents and deeds that was not subject to changes in meanings ensuing from time or circumstances. The statute says that Section boundary lines are defined by the corners established during the surveys performed in accordance with Title 43 U.S.C. § 752.

The dispute tried before Judge Cole was about the location of a boundary between land owned by Donald, north of a Section line, and land owned by the Kimberleys south of the Section line in Section 26. Judge Cole said in his order, “The parties agree that the Section line is their boundary, but disagree as to the location of the Section line.”

Title 43 U.S.C. § 752 prohibits moving a Section line; however, the Alabama Judicial System has ruled as if this prohibition does not apply to it. The location of the Section line declared by Judge Cole is different from the location of the Section line defined by the survey of Township 5 South, Range 10 East, conducted by the U.S. Government during 1839-40 in accordance with Title 43 U.S.C. § 752. This difference is shown beginning on page 12 in the section of this statement of the case subtitled *The Moving of the Section Line*. It is very important that each Section line continues to be understood to be where it was when the land was last surveyed as Public Land, because land owners rely on permanent locations of Section lines in determining and marking the boundaries of their property. The moving of the Section line on the north boundary of Section 26 has deprived Donald of property and will create disputes about who owns nearby property. Such "changing of the rules" was what Title 43 U.S.C. § 752 was intended to prohibit.

"A patent is the highest evidence of title, and is conclusive as against the Government ..." *United States v. Stone*, 69 U.S. (2 Wall.) 525, 535, 17 L.Ed. 765 (1864). When the northeast quarter of Section 26 was patented to William B. Taylor on December 31, 1889, by President Benjamin Harrison, according to Homestead Certificate 43149, Application 10832, it was described with reference to the Section line defined according to the Official Plat of the Survey of the Land made during 1839-40 according to the dictates of Title 43 U.S.C. § 752. That gave an ascertainable, physical meaning to the land patented. Judge Cole's order declaring a new

location for the Section line approximately 130 years later cannot change the parcel of land conveyed to Taylor and to his successors in title in 1889.

Early in this case, Donald filed a *Brief re Section Lines* in trial court on September 25, 2017, in which, on its first page, the brief stated, “A United States Government Survey section line cannot be moved either by agreement of landowners or through adverse possession or by any other means.” Donald’s brief elaborated on the requirements of Title 43 U.S.C. § 752. Throughout this case, Donald argued, time and time again, that Title 43 U.S.C. § 752 determines the location of a Section line, but neither Judge Cole nor the Alabama appellate courts ever acknowledged this law. Donald’s *Brief re Section Lines* is included in the Appendix beginning on page A25.

No order issued by the Circuit Court of DeKalb County or by the Alabama Court of Civil Appeals or by the Supreme Court of Alabama opined that the Section line was not moved by Judge Cole’s order.

Judge Cole’s Order of June 21, 2018, is included in the Appendix beginning on page A3. The order completely ignored Title 43 U.S.C. § 752 and its requirements. Donald filed *Motion to Reconsider* on July 7, 2018, pages of which are included in the Appendix beginning on page A35. Donald’s motion stated on page A37 that, “43 U.S.C. § 752 provides that the corners of a section and any other landmarks within the section established by the original government survey shall be adhered to in the future”. Donald’s motion extensively argued the

failures of Judge Cole's Order to adhere to the concepts embodied in Title 43 U.S.C. § 752.

Judge Cole issued a second order on August 9, 2018, which struck, from his first order, a crucial, false finding which he had used to justify his earlier judgment; but, nevertheless, in his second order, he denied Donald's *Motion to Reconsider*. This second order also ignored Title 43 U.S.C. § 752 and its requirements. This order is included in the Appendix beginning on page A8.

Prior to a final order in the case which addressed a counterclaim by the Kimberleys, Donald filed *Motion to Reconsider Orders Moving Section Line* on January 27, 2019, which is included in the Appendix beginning on page A43. Donald's motion stated, on page A45, that, "Section lines established by the United States government may not be moved", citing Alabama law, 5 So.3d 634, based on 43 U.S.C. § 752.

The final order in the trial court, filed on September 30, 2019, after Judge Cole retired from office, denied the counterclaim against Donald, and denied all other pending motions without written opinions, including Donald's *Motion to Reconsider Orders Moving Section Line*.

On October 8, 2019, Donald filed *Appellant's Brief* in the Alabama Court of Civil Appeals, pages of which are included in the Appendix beginning on page A47. On page A49, Donald's brief, citing Alabama law, 22 So. 910, stated, "In this state, the lines of sections and subdivisions thereof, are to be located by the original government survey. Code 1886, § 84, subds.

13-15, and section 832.” On page A51, Donald’s brief, citing Alabama law, 78 So.2d 324, stated, “It is provided in U.S.C.A., Title 43, § 752, that ‘the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.’”

The Alabama Court of Civil Appeals affirmed Judge Cole’s trial court order on September 11, 2020, without a written opinion. An *Application for Rehearing* was overruled on January 8, 2021, without a written opinion. The orders of the Court of Civil Appeals are included in the Appendix beginning on page A17. The citations included in the affirmation of the trial court’s orders did not address the location of the Section line or the requirements of Title 43 U.S.C § 752.

Donald then petitioned the Supreme Court of Alabama for a writ of certiorari to be issued to the Alabama Court of Civil Appeals. Donald’s petition is included in the Appendix beginning on page A54. On page A62, Donald’s petition to the Supreme Court of Alabama stated:

“43 U.S.C. § 752 provides that the corners of a section and any other landmarks within the section established by the original government survey shall be adhered to in the future.” *First Beat v. ECC*, 962 So.2d 266 (Ala.Civ.App. 2007). “The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary

lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned, shall be held and considered as the true length thereof." 43 U.S. Code § 752.

Donald's petition to the Supreme Court of Alabama was denied on July 9, 2021, with five of nine justices concurring. The Certificate of Judgment is included in the Appendix on page A20. It included no opinion.

The Circuit Court of DeKalb County, Alabama, and the Alabama Court of Civil Appeals, and the Supreme Court of Alabama all failed to address the requirements of Title 43 U.S. Code § 752 or even to mention that crucial federal law in any of their orders which moved or affirmed or left standing the moving of the Section line which is shown in *The Moving of the Section Line* on the next page (12).

"Prior to title passing from the United States, the government has the power to survey and resurvey, establish and reestablish boundaries on its own land. *Lane v. Darlington*, 249 U.S. 331 (1919). But once patent has issued, the rights of patentees are fixed and the government has no power to interfere with these rights, as by a corrective resurvey. *Cragin v. Powell*, 128 U.S. 691 (1888); *United States v. Reimann*, 504 F.2d 135, 138 (10th Cir.1974). The patent includes the notes, lines and descriptions that are part of the original survey. *Reimann*, 504 F.2d at 140."

Dumas v. United States Department of the Interior, 2005 WL 608276, No. CV 04-489-KI, March 16, 2005.

The Moving of the Section Line

In the Circuit Court of DeKalb County, Alabama, Judge Randall Cole's order of June 21, 2018, moved the North boundary line of Section 26 in violation of Title 43 U.S.C. § 752 and deprived petitioner and land owner Donald of property without due process, and confused the boundaries of nearby land owners.

Judge Cole ordered, “[I]t is adjudged that the location of the Section line dividing Sections 26 and 23 is consistent with the findings of Surveyor Johnny Croft, and that the Northwest corner of defendants' property is that point which Croft determined to be the midpoint of the Section line as indicated on his survey plat dated October 22, 2009.”

In addition to violating Title 43 U.S.C. § 752, Judge Cole founded his order on a false premise, because Croft had testified at trial that he did not determine that the northwest corner of defendant's property indicated on his 2009 plat was the midpoint of the Section line: (R.038-39)

Q. How did that prove anything about the position of that marker within the section? ...

A. I understand that because it's been checked with the dimensions of the deed given the degree of accuracy of rural land surveying.

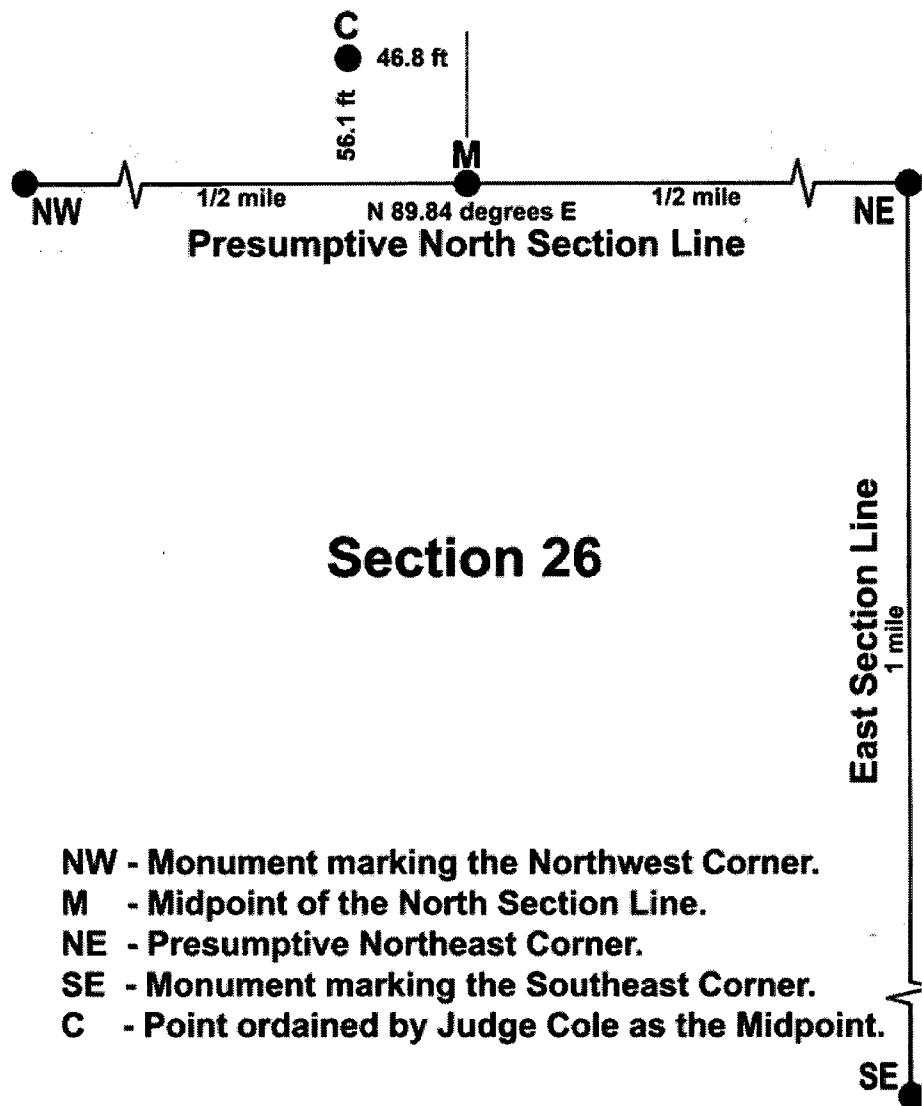
Q. Well, did you --

A. Did I go further to prove whether or not it was a half mile corner?

Q. Yes, sir.

A. No, sir.

Section 26 and its north line, the “Section line” addressed in Judge Cole’s order, are illustrated below in a diagram of Section 26 depicting undisputed evidence presented at the trial in this case, 28-CV-2017-900198, in DeKalb County, Alabama, Circuit Court. Judge Cole rejected, without explanation, the Presumptive North Section Line. Instead, he ordered that the Section line ran through point C.



This diagram of Section 26 shows that the Section line ordered by Judge Cole, running through point C, was different from the line running between point NW and point NE which is the true Section line as shown by the following facts.

1. The Southeast corner of Section 26 (point "SE" in the diagram of Section 26) is marked with a monument established during the original 1839-40 survey. No one disputes that this monument is correctly located.
2. The Northwest corner of Section 26 (point "NW" in the diagram of Section 26) is marked with a monument established during 1996 by surveyor Johnny Croft as a re-establishment of the monument established during the original 1839-40 survey. No one disputes that this monument is correctly located.
3. The 1839-40 field notes and survey plat show that the East Section Line is one mile long and runs due north from the Southeast corner of Section 26 and ends at the East end of the North Section Line.
4. The 1839-40 field notes and survey plat show that the North Section Line is one mile long and runs due east from the Northwest corner of Section 26 and ends at the North end of the East Section Line.
5. The point (point "NE" in the diagram of Section 26) one mile east of the monument marking the Northwest corner of Section 26 and one mile north of the monument marking the Southeast corner of Section 26 is the "presumptive Northeast corner" of Section 26.

6. The “presumptive North section line” is the straight line running between the monument marking the Northwest corner of Section 26 and the presumptive Northeast corner of Section 26.
7. The point declared by Judge Cole as the “midpoint of the Section line” (point “C” in the diagram of Section 26) is 46.8 feet west of the midpoint of the presumptive North section line and is 56.1 feet north of the presumptive North section line.
8. If Judge Cole’s newly-declared North section line begins at the monument marking the Northwest corner of Section 26 and runs approximately 2,593.2 feet to Judge Cole’s newly-declared “midpoint” and on past it for an equal distance, Judge Cole’s newly-declared North section line would be 94 feet shorter than the line described in the 1839-40 survey and would be 1.40 degrees different in bearing.
9. It is impossible for there to be a line running due east, in accordance with the original 1839-40 survey, through the point declared by Judge Cole as the “midpoint of the Section line” and which ends at the presumptive Northeast corner of Section 26.

This was all shown, without any disputing evidence, at the trial before Judge Cole in the Circuit Court of DeKalb County, Alabama, on June 11, 2018.

ARGUMENT

The evidence presented at the trial in Circuit Court on June 11, 2018, which was not disputed, shows that the order of June 21, 2018, by Judge Randall Cole established a different North boundary line for Section 26 than the line described in the survey of 1839-40 which was the final survey by the U.S. Government while the land was still classified as public land. No order by the Alabama judicial system has stated that the Section line was not moved by Judge Cole. Judge Cole's order violated the central concept of Title 43 U.S.C. § 752 that, "The boundary lines, actually run and marked in the surveys ... shall be established as the proper boundary lines of the sections ..."

Judge Cole's trial court order was affirmed by the Alabama Court of Civil Appeals, and the Supreme Court of Alabama declined to further consider the matter. This suggests a broad misunderstanding of Title 43 U.S.C. § 752 by the judicial system. It appears to be genuinely believed that this statute only applies to the Federal Government, and that, after a section of land in a state is patented, the state in which the land is located may redefine the section's boundaries as its judges see fit. But, such a concept makes no sense in the context of the warranty expressed by the Federal Government in a land patent, and it was surely not what John Adams intended when he and Thomas Jefferson formulated the statute.

A ruling by the Supreme Court of the United States that Title 43 U.S.C. § 752 applies to state judicial

systems will avoid further confusion and wasteful litigation about this important matter in real property law.

CONCLUSION

The Supreme Court of the United States should issue a writ of certiorari to the Supreme Court of Alabama in case 1200245, and, upon review of the matters in this case, should rule that Title 43 U.S.C. § 752 applies to state judicial systems and prohibits the moving of a Section line, and should order the Supreme Court of Alabama to direct the Circuit Court of DeKalb County, Alabama, in case 28-CV-2017-900198, to order that the north boundary line of Section 26 is located as defined by the 1839-40 survey, in accordance with Title 43 U.S.C. § 752, as it was stated to be in the patent of the land.

Respectfully submitted,

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