

APPENDIX

OPINIONS, ORDERS, FINDINGS, CONCLUSIONS

**Order** (see page A3) by the Circuit Court of DeKalb County, Alabama, in case Thomas C. Donald v. James P. Kimberley and Carol J. Kimberley, case no. 28-CV-2017-900198, entered on June 21, 2018.

**Order** (see page A8) by the Circuit Court of DeKalb County, Alabama, in case Thomas C. Donald v. James P. Kimberley and Carol J. Kimberley, case no. 28-CV-2017-900198, entered on August 9, 2018.

**Final Order** (see page A11) by the Circuit Court of DeKalb County, Alabama, in case Thomas C. Donald v. James P. Kimberley and Carol J. Kimberley, case no. 28-CV-2017-900198, entered on September 30, 2019. The final order dismissed a counterclaim which was unrelated to the judgment sought to be reviewed. It also dismissed all pending motions without opinion.

**Affirmation without Opinion** (see page A17) by the Alabama Court of Civil Appeals, in case Thomas C. Donald v. James P. Kimberley and Carol J. Kimberley (Appeal from DeKalb Circuit Court CV-17-900198), case no. 2190017, entered on September 17, 2020.

**Overrule of Rehearing Application without Opinion** (see page A18) by the Alabama Court of Civil Appeals, in case Thomas C. Donald v. James P. Kimberley and Carol J. Kimberley (Appeal from DeKalb Circuit Court CV-17-900198), case no. 2190017, entered on January 8, 2021.

**Denial of Petition for Writ of Certiorari without Opinion (five of nine justices concurring)** (see page A20) by the Supreme Court of Alabama, in case 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), case no. 1200245, entered on July 9, 2021.

A3

APPENDIX

ORDER

IN THE CIRCUIT COURT OF  
DEKALB COUNTY, ALABAMA

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY AND  
CAROL J. KIMBERLEY

CASE NO. 28-CV-2017-900198

FILED ON JUNE 21, 2018

Reformatted in compliance with court rules.

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IN THE CIRCUIT COURT OF  
DEKALB COUNTY, ALABAMA

DONALD THOMAS C. )  
PLAINTIFF )

VS. ) Case No. CV-2017-900198

KIMBERLEY JAMES P. )  
KIMBERLEY CAROL J. )  
DEFENDANTS )

ORDER

{¶ 01} The complaint in this case seeks a declaration as to the true boundary line between plaintiff and defendants who are adjoining landowners. The defendants file an answer and counterclaim in response to plaintiff's complaint and

assert in the counterclaim that plaintiff trespassed upon their property and they seek money damages. Plaintiff filed the complaint pro se and represents himself in the prosecution of the complaint; however, he is represented by counsel in defense of the counterclaim.

{¶ 02} The court severed the complaint and the counterclaim, and the issues raised by the complaint were the subject of a final hearing on June 11, 2018.

{¶ 03} Plaintiff's land is located in Section 23, Township 5, Range 10 East in DeKalb County, Alabama, and is more specifically described in a deed recorded at Deed Book 773, Page 206, DeKalb County, Alabama Probate Office. Defendant's land is located in Section 26, Township 5, Range 10 East DeKalb County, Alabama, and is more specifically described in a deed recorded in Deed Book 717, Page 165, DeKalb County, Alabama Probate Office.

{¶ 04} Plaintiff's land is located north of the Section line that divides Section 23 and 26, and defendants' land is located south of that Section line. The parties agree that the Section line is their boundary but disagree as to the location of the Section line. Plaintiff maintains that a firebreak or wooded roadway which defendants have blocked is located on his property north of the Section line, and defendants maintain the firebreak or roadway is located on their property south of the Section line.

{¶ 05} There was lay testimony presented at the trial as well as the testimony of two licensed professional land surveyors.

{¶ 06} Surveyor Johnny Croft, who has been licensed since 1978, had surveyed the property of defendants in 2009. His testimony was, in substance, as follows:

{¶ 07} In 1996, he established the Northwest corner of Section 26 near the intersection of DeKalb County Roads 642 and 631, and set a railroad spike in the middle of the asphalted roadway. In performing the 2009 survey for defendants, he used this reference point and the original government survey field notes and ran a line east to a point where he located an existing stone which he determined to be the half-mile point of the Section line and the Northwest corner of defendants' property, and he put a metal pin there. He located the other three corners of defendants' property, and found that the deed description appropriately closed back at the point of beginning which was the existing stone which he had determined to be the midpoint of the Section line and the Northwest corner of defendants' property.

{¶ 08} Surveyor Croft further testified that in his professional opinion, the stone that he located was the Section line's half-mile point from the Section corner he had marked with the railroad spike. Surveyor Croft's testimony supports defendants' contention as to the location of the Section line.

{¶ 09} The other surveyor, Dwayne Hawes, performed a recent survey for plaintiff seeking to determine the location of the Section line. He, too, began at the point where Croft had placed the railroad spike. From that point, he calculated a line

running east to determine the midpoint of the Section line. His calculation resulted in a placement of the midpoint 56 feet south and a lesser distance east of the existing stone that Croft determined to be the midpoint. Hawes testified that he does not know if his calculated line is the Section line. His line appears to run through an existing shed and when asked about the location of the firebreak or roadway in relation to the location of his calculated line, he testified that the roadway was north of his line, but he could not state that the roadway was north of the Section line.

{¶ 10} When a court cannot determine with absolute certainty the true boundary line, it should consider all physical indications and monuments, if any, as well as courses and distances. *Keith v. Milford*, 270 Ala. 37 (Ala.1960). And some courts hold that where there is conflict between courses and distances, and natural or artificial monuments, monuments prevail. *See Pench v. Buchart*, 380 Pa. Super. 205, 551 A.2d 303 (1988).

{¶ 11} Neither party suggests that this court can change a Section line, and it is not the court's intention to attempt such. It is only the court's function in this case to determine the location of the Section line. Upon consideration of the evidence as a whole, the court finds and it 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. Consistent with this finding, it is adjudged that the firebreak or

roadway here in dispute is located in Section 26 on the property of the defendants.

{¶ 12} Other relief sought by plaintiff's complaint is denied.

{¶ 13} The trial of defendants' counterclaim is set for September 27, 2018, at 9 a.m.

{¶ 14} DATED this the 21<sup>st</sup> day of June, 2018.

s/ Randall L. Cole  
RANDALL L. COLE  
CIRCUIT JUDGE

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APPENDIX

ORDER

IN THE CIRCUIT COURT OF  
DEKALB COUNTY, ALABAMA

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY AND  
CAROL J. KIMBERLEY

CASE NO. 28-CV-2017-900198

FILED ON AUGUST 9, 2018

Reformatted in compliance with court rules.

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IN THE CIRCUIT COURT OF  
DEKALB COUNTY, ALABAMA

THOMAS C. DONALD     )  
                          PLAINTIFF )

VS.                             ) Case No. CV-2017-900198

JAMES P. KIMBERLEY )  
                          DEFENDANT )

ORDER

{¶ 01} This matter is before the court on plaintiff's motion to reconsider the court's order entered June 21, 2018, and find that the location of the Section line here in question is located as depicted on the survey of Surveyor Dwight Hawes.



The motion was the subject of a hearing on July 31, 2018.

{¶ 02} The court denies the motion, but amends the order of June 21, 2018, as set out herein.

{¶ 03} Plaintiff correctly points out that the court was in error by stating in its order that Surveyor Johnny Croft located an existing stone that he determined to be the half-mile point of the Section line *by using government field notes and running a line east from a point of reference earlier established as the Northwest corner of the section;* and the court strikes this finding from the order.

{¶ 04} The court, however, reaffirms its statement in the order of June 21, 2018, that Surveyor Croft upon locating the existing stone determined it to be the half-mile point of the Section line and the northwest corner of the defendants' property.

{¶ 05} Surveyor Croft's opinion that the existing stone was the half-mile point of the Section line is supported by the government field notes which mention a half-mile corner or post. It is also supported by the fact that Surveyor Croft found that the defendants' deed description appropriately closed back to the stone as the description's point of beginning.

{¶ 06} An adjoining landowner, Leon Crane, testified that the corner identified by Croft's survey had been recognized for over forty years as the Northwest corner of the property now owned by

defendants. The Hawes line, however, runs through an existing shed on Crane's property.

{¶ 07} As the court stated in its order of June 21, 2018, Surveyor Hawes testified that he did not know whether his line was the Section line. His was a calculated line on paper without reference to anything on the ground. He testified, "That line on my plat is on paper, but there is nothing on the ground."

{¶ 08} The point of beginning for the Hawes line was a railroad spike placed by Croft in 1996 at the intersection of two paved roads which Croft re-established as the Northwest section corner of Section 26. In testifying about the re-establishment of this corner, Croft stated that he could not retrace the footsteps of the original surveyors, and that because corners are destroyed by roads and other things, surveyors today have to rely on the closest available information to re-establish corners, and that the re-establishment of this corner could be close to the original corner or could be off by fifty feet.

{¶ 09} Upon the court's re-examination of the evidence as a whole, it is adjudged that plaintiff's motion to reconsider is denied.

{¶ 010} DATED this the 9th day of August, 2018.

s/ Randall L. Cole  
RANDALL L. COLE  
CIRCUIT JUDGE

A11

APPENDIX

FINAL ORDER

IN THE CIRCUIT COURT OF  
DEKALB COUNTY, ALABAMA

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY AND  
CAROL J. KIMBERLEY

CASE NO. 28-CV-2017-900198

FILED ON SEPTEMBER 30, 2019

Reformatted in compliance with court rules.

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IN THE CIRCUIT COURT OF  
DEKALB COUNTY, ALABAMA

DONALD THOMAS C. )  
PLAINTIFF )

V. ) Case No. CV-2017-900198

KIMBERLEY JAMES P. )  
KIMBERLEY CAROL J. )  
DEFENDANTS )

FINAL ORDER

{¶ 01} The above styled case came for a final non-jury civil trial the 24<sup>th</sup> day of September 2019 on the sole remaining issue, to wit: the Defendants' Counter-Claim(s) against the Plaintiff. The Plaintiff, Thomas C. Donald, was present with his attorney, J.

Len Ryals, Esq.; and the Defendants, James and Carol Kimberley, were present with their attorney, Robert French, Esq.

{¶ 02} The Kimberleys allege that Mr. Donald has trespassed on their land and brought litigation against them as a false and malicious act. For the purposes of defending this counter-claim Mr. Donald hired J. Len Ryals; however, he began this litigation as an unrepresented litigant. The Kimberleys seek "\$10,000 in compensatory damages; \$25,000 in punitive damages; attorney fees of \$7,500, and court costs with appropriate interest."<sup>1</sup>

{¶ 03} The main allegations in this cause of action are governed by the Alabama Litigation Accountability Act. **Code of Alabama (1975) § 12-19-272** states the following:

**Court to award fees and costs against attorney or party who brought action without substantial justification; voluntary dismissal.**

(a) Except as otherwise provided in this article, in any civil action commenced or appealed in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorneys' fees and cost against any attorney or party, or both, who has brought a civil action, or assessed a claim therein, or interposed a defense, that a court

<sup>1</sup> See Counterclaim at Alacourt document 92.

determines to be without substantial justification, either in whole or part;

(b) When a court determines reasonable attorneys' fees or costs should be assessed it shall assess the payment thereof against the offending attorneys or parties, or both, and its discretion may allocate among them, as it determines most just, and may assess the full amount or any portion thereof to any offending attorney or party.

(c) The court shall assess attorneys' fees and costs against any party or attorney if the court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action or any part thereof, or asserted any claim or defense therein, that is without substantial justification, or that the action or any part thereof, or any claim or defense therein, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including but not limited to abuses of discovery procedures available under the Alabama Rules of Civil Procedure;

(d) No attorneys' fees or costs shall be assessed if a voluntary dismissal is filed as to any action, claim or defense within 90 days after filing, or during any reasonable extension granted by the court, for good cause shown, on motion filed prior to the expiration of said 90 day period.

(e) No party, except an attorney licensed to practice law in this state, who is appearing without an attorney shall be assessed attorneys' fees unless the court finds that the party clearly knew or reasonably should have known that his action, claim or defense or any part thereof was without substantial justification.<sup>2</sup>

{¶ 04} Mr. Donald was an unrepresented litigant throughout most of this case, and he is not a licensed attorney in this or any other state. However, due to Mr. Donald's experience in the legal system prosecuting and defending cases involving similar scenarios, to wit: boundary line disputes and easement disputed, he is not considered by this court to be a complete novice.<sup>3</sup> Regardless of that opinion, this court is "required by the ALAA to make a finding that he clearly knew or reasonable should have known that the action he filed was without substantial justification."<sup>4</sup>

{¶ 05} Mr. Donald's Complaint (filed August 17, 2017) and Amended Complaint (January 30, 2018) appear to seek the declaration of boundary line(s) pursuant to **Code of Alabama (1975) § 35-3-1 et. seq.**, and damages for the Kimberley's erecting a "barricade on the road." **Code of Alabama (1975) § 35-3-2** states the following:

<sup>2</sup> Emphasis added by the undersigned.

<sup>3</sup> See Smalley v. Donald, et. al. 28-CV2008-244; Donald v. Blair, 28-CV-2007-188; Edwards v. Donald, 28-CV-2006-316.

<sup>4</sup> *Schweiger v. Town of Hurtsboro*, 68 So.3d 181 (Ala.Civ.App 2011). See also *Wooten v. Morton, et. al.*, 138 So.3d 990 (Ala.Civ.App. 2012).

**Right to maintain action; duty of the court to determine claims and make order.**

Actions may be brought by any person owning land or any interest therein against the owner or person interested in adjoining land to have the boundary lines established; and when the boundary lines of two or more tracts depend upon the same common point, line, or landmark, and action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court shall determine any adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines and shall make such order respecting costs and disbursements as it shall deem just.

{¶ 06} Pursuant to the above cited code section, Mr. Donald had a right to initiate the action to establish the boundary line. To this court's knowledge, no previous action by and between these parties or their predecessors in title regarding the location of the boundary line(s) in question has been determined by a court of competent jurisdiction. If there had been previous litigation between predecessors in title regarding the location of the disputed boundary lines in this case that had been decided by a court of competent jurisdiction, then Mr. Donald or the Kimberleys would be deemed by this court to have known or should have known that there was no substantial justification for this action. Such

is not the case and there seemed to be a dispute as to the location of the boundary line.

{¶ 07} The Honorable Judge Randall L. Cole decided the location of the true boundary line after a full and fair trial on these issues. This Court inherited what was left of this case following Judge Cole's retirement.

{¶ 08} Therefore, based upon the testimony presented, the record, pleadings, exhibits admitted, and applying the law to the facts it is hereby ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

{¶ 09} 1. That the Counter-Claim(s) filed by James P. Kimberley and Carol Kimberley against Thomas C. Donald is DENIED.

{¶ 010} 2. That all other relief requested by either party not specifically addressed herein, or in Judge Cole's previous orders as DENIED.

{¶ 11} 3. That the cost of this action is taxed to the party that prepared the same.

{¶ 12} Done this 30<sup>th</sup> day of September 2019.

s/ Shaunathan Bell  
CIRCUIT JUDGE



APPENDIX

AFFIRMATION OF TRIAL COURT JUDGMENT  
IN THE ALABAMA COURT OF CIVIL APPEALS

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY AND  
CAROL J. KIMBERLEY

CASE NO. 2190017

FILED ON SEPTEMBER 11, 2020

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REL: September 11, 2020

STATE OF ALABAMA – JUDICIAL DEPARTMENT  
THE COURT OF CIVIL APPEALS  
SPECIAL TERM, 2020

2190017

Thomas C. Donald v. James P. Kimberley  
and Carol J. Kimberley.

Appeal from DeKalb Circuit Court (CV-17-900198).

PER CURIUM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.;  
Williams v. Clark, 263 Ala. 228, 228, 82 So. 2d 295,  
295-296 (1955); Williams v. Laubenthal Land &  
Timber Co., 941 So. 2d 301, 303-304 (Ala. Civ. App.  
2006); and Ezell v. Ezell, 440 So. 2d 560, 562 (Ala.  
Civ. App. 1983).

All the judges concur.

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APPENDIX

APPLICATION FOR REHEARING OVERRULLED  
IN THE ALABAMA COURT OF CIVIL APPEALS

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY AND  
CAROL J. KIMBERLEY

CASE NO. 2190017

FILED ON JANUARY 8, 2021

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**The Court of Civil Appeals**

[Seal of the State of Alabama]

REBECCA C. OATES      MEG WILLIAMS FIEDLER  
CLERK                      ASSISTANT CLERK

300 DEXTER AVENUE  
MONTGOMERY, ALABAMA 36104-3741  
TELEPHONE 304-229-0733

January 8, 2021

**2190017**

**Thomas C. Donald v. James P. Kimberley and  
Carol J. Kimberley (Appeal from DeKalb  
Circuit Court CV-17-900198)**

**You are hereby notified that the following action was taken in the above cause by the Court of Civil Appeals:**

**Application for Rehearing Overruled. No opinion on rehearing.**

**Thompson, P.J., and Moore, Donaldson, Edwards, and Hanson, JJ., concur.**

**s/ Rebecca C. Oates  
Rebecca C. Oates  
Clerk, Court of Civil Appeals**

A20

APPENDIX

DENIAL OF WRIT OF CERTIORARI  
IN THE SUPREME COURT OF ALABAMA

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY AND  
CAROL J. KIMBERLEY

CASE NO. 1200245

FILED ON JULY 9, 2021

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IN THE SUPREME COURT OF ALABAMA

[Seal of the State of Alabama]

July 9, 2021

1200245

Ex parte Thomas C. Donald. PETITION FOR 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).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in  
the above referenced cause has been duly submitted  
and considered by the Supreme Court of Alabama

and the judgment indicated below was entered in this cause on July 9, 2021:

Writ Denied. No Opinion. Mitchell, J. – Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 9<sup>th</sup> day of July, 2021.

s/ Julia Jordan Weller  
Clerk, Supreme Court of Alabama

APPENDIX

THE PUBLIC LAND SURVEY SYSTEM  
UNITED STATES V. ESTATE OF ST. CLAIR  
(EXTRACTED PAGES)

2016, 819 F.3d 1254, at page 1256

UNITED STATES COURT OF APPEALS,  
TENTH CIRCUIT

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***The Public Land Survey System***

In 1785, Thomas Jefferson and John Adams led a coalition in the Continental Congress to create a system for the government to survey public domain land. U.S. Dep't of the Interior, Bureau of Land Mgmt., *A History of the Rectangular Survey System* 11 (1991). The Land Ordinance of 1785 established the rectangular survey system, which was promptly used to survey public land in the original 13 colonies and the Northwest Territory. *See id.* at 13–16. Known as the Public Land Survey System, it is still used today. *See id.*; 43 U.S.C. § 751; 2 George Cameron Coggins & Robert L. Glicksman, *Public Natural Resources Law* § 13:52 (2nd ed. 2012).

Under this system, the Bureau of Land Management (“BLM”), like its predecessors, commissions surveyors to divide federal land into “townships,” which are 36–square–mile tracts of land. Coggins & Glicksman, *supra*, at § 13:52; U.S. Dep't of the

Interior, Bureau of Land Mgmt., *Manual of Surveying Instruction* 12 (2009) [hereinafter BLM Surveying Manual]. Surveyors then divide each township into 36 “sections”—one-square-mile (640 acres) tracts of land. BLM Surveying Manual at 12.

A township with sections appears as follows:

Township Line					
6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36
Range Line					

**Figure 1-2. A regular township.**

BLM Surveying Manual at 12.

Surveyors set boundaries for townships and sections by placing monuments on the ground and recording

the location of these monuments in their field notes. See 43 U.S.C. § 752. Monuments are placed to mark a given section's four corners and the half-way points between two corners—called “quarter corners.” *Id.*; see also U.S. Dep't of the Interior, Bureau of Land Mgmt., *Glossary of BLM Surveying and Mapping Terms* 52 (1980) [hereinafter BLM Glossary]. From a surveyor's field notes, the BLM creates an official “plat,” a map showing the boundaries of a township and its sections. 43 U.S.C. § 751; see also BLM Glossary at 49.

Based on an official plat, the government may issue land patents, essentially deeds, to convey land in a township or a section of a township to private citizens. See 2 Joyce Palomar, Patton and Palomar on Land Titles § 292 (3d ed.) (“A patent is a government conveyance just the same as a deed is a private conveyance.”). Land patents describe the land conveyed either by reference to a fraction of the official plat—an “aliquot” description—or by reference to landmarks and adjoining properties—a “metes and bounds” description. See BLM Surveying Manual at 47; 1 Palomar, *supra*, § 126.

“[A] patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal.” *United States v. Stone*, 69 U.S. (2 Wall.) 525, 535, 17 L.Ed. 765 (1864).



APPENDIX

BRIEF RE SECTION LINES  
IN THE CIRCUIT COURT OF  
DEKALB COUNTY, ALABAMA

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY

CASE NO. 28-CV-2017-900198

FILED ON SEPTEMBER 25, 2017

Reformatted in compliance with court rules.

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IN THE CIRCUIT COURT FOR  
DEKALB COUNTY, ALABAMA

**Thomas C. Donald, Plaintiff**

**v.**

**Case Number CV-2017-900198**

**James P. Kimberley, Defendant**

**Brief re Section Lines**

Comes now Thomas C. Donald, plaintiff in the above-styled cause, and submits this brief regarding section lines.

**Issues:**

- a) Is the boundary line between two adjacent United States Government Survey sections a straight line running between their two pairs of common corners? Alternatively stated: Is the

boundary line of a United States Government Survey section, which runs from a corner of a section to an adjacent corner of the same section, a straight line?

b) Can a section line determined by a United States Government Survey be moved?

c) Can land described as being in a given section include land actually lying in an adjacent section?

**Rule of Law:**

a) Yes. Section lines of the United States Government Survey run the shortest straight-line distance between adjacent corners of the section in question.

b) No. A United States Government Survey section line cannot be moved either by agreement of landowners or through adverse possession or by any other means.

c) No. A conveyance of land described as being on one side of a section line does not, on its face, include contiguous land actually lying on the other side of the section line.

**Analysis of Issue “a”:**

Under Title 43, United States Code, the Secretary of the Interior was authorized to conduct surveys of the country thereby creating a structure of Ranges, Townships and Sections. Here we are concerned

with the section, a roughly square unit of land (one mile by one mile) comprising approximately 640 acres. Each section was laid out by the United States Government Survey through the placement of each of the four corners of the section, and with the distance and bearing between corners being noted by the surveyors at the time of the survey. See 43 *U.S.C. § 751*.

The next section of Title 43 provides basic principles for the survey:

“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 ... 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 ... 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; ...”**

*43 U.S.C. §752* (emphasis added).

The United States Supreme Court, in addressing the issue of sections lines, notes: "the ... line of the sections is, so far as these lots are concerned, the **ordinary straight line** of government surveys." *Horne v. Smith*, 159 U.S. 40 (1895) (emphasis added).

Although very few cases addressing the issue can be found, those which do, concur with the straight line standard. "It is true, as asserted by defendant, that the surveying rules (*43 U.S.C.A. § 751 et seq.*) require section lines to be run in **straight** parallel lines." *Addis v. Hoagland*, 8 So.2d 655 (Fla. 1942) (Florida Supreme Court commenting on adherence to United States Survey) (emphasis added). The Supreme Court of Maine held in a case regarding surveying between two points in a United States Survey township that where "[T]he point of departure is well ascertained. [and] The point to be reached is equally well fixed. The line to be run must be the shortest distance between these two designated and established corners." *Grant v. Black*, 53 Me. 373, 1865 WL 924 (1865). *See also* *Britton v. Ferry*, 14 Mich. 53, 1866 WL 2834 (1866) (wherein Justice Cooley provides an extended discussion of the U.S. Survey and its origins).

Adherence by Alabama courts to the United States Surveys was addressed in *North Clarke Water Authority v. Dockery*, wherein the court held that:

"In this state all disputes as to lines of sections and subdivisions thereof are to be governed by the United States Survey and located by reference to the original government survey." *Mims v. Alabama Power Co.*, 262 Ala. 121, 124, 77 So.2d 648, 651 (1955)." *North Clarke Water Authority v. Dockery*, 5 So.3d 634, 637 (Ala.Civ.App. 2008). *See also First Beat v. ECC*, 962 So.2d 266 (Ala.Civ.App. 2007) and *Coley v. Fain*, 20 So.3d 824 (Ala.Civ.App. 2009).

Perhaps the reason for the sparse number of cases on this first issue is because most surveyors and attorneys understand this aspect of the law and adhere to it.

### **Analysis of Issue "b":**

The second issue of whether or not a United States Government Survey section line can be moved has been addressed more thoroughly by the courts. It has been conclusively established in Alabama case law that a United States Government Survey **section line cannot be moved.**

"Boundary lines between coterminous landowners may be altered by an agreement or by adverse possession; however, section lines established by the United States government may not be relocated. *Mims v. Alabama Power Co.*, 262 Ala. 121, 124, 77 So.2d 648, 651 (1955); *see also Sims v. Sims*, 273 Ala. 103, 134 So.2d 757 (1961) (government-established section lines may not be relocated by acts of the parties); and *Upton v. Read*, 256 Ala. 593, 594, 56 So.2d 644, 645 (1952) (recognizing case law as establishing the proposition that "no act of

the parties can relocate the section lines as established by government survey”).”

*North Clark Water Authority v. Dockery*, 5 So.3d 634, 637 (Ala.Civ.App. 2008).

Federal law (43 U.S.C. § 752) specifies that section corners established during the original Government Survey shall be adhered to in the future.

“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).

Markings of lines (by surveyors or otherwise) which are thought to represent a section boundary line, but which, in fact, are not section boundary lines, do not have any bearing on the true location of the section boundary line.

“[R]ecognition by adjoining owners of a false line as the boundary between them is without effect, unless the party claiming beyond the true line also holds hostile possession up to the false line until the bar of the statute is complete. Even a formal agreement between them as to such a line could not, of itself, vest title in one of them beyond the true line to which each actually owns. Certainly it could not have the effect of transferring one part of a government survey 40 to the 40 just below it[.]”

*Oliver v. Oliver*, 65 So. 373, 375 (Ala. 1914).

Federal law (43 U.S.C. § 752) specifies that points along a section boundary line not monumented during the original United States Government Survey shall be placed on the straight line between the corners, and markers not placed on the line are subject to being corrected.

“The manner in which the original survey was conducted was controlled by an Act of Congress. Title 43 U.S.C.A. § 751 et seq. It is provided in section 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.’

*Dougherty v. Hood*, Ala., 78 So.2d 324. The corners of subdivisions were declared not to be established by that survey as were the section corners. And if they were incorrectly located by that survey they were subject to be corrected by pursuing the formula prescribed by section 752, *supra*. *Walters v. Commons*, 2 Port. 38; *Nolen v. Palmer*, 24 Ala. 391; *Billingsley v. Bates*, 30 Ala. 376-380.”

*O’Rear v Conway*, 263 Ala. 466, 467-8, 83 So.2d 65, 66 (Ala. 1955). (Note that “that survey” refers to a survey performed in 1949.)

Once a section boundary line is established (by, for example, the marking of its end points), no evidence from subsequent surveys or otherwise can change it. Faith may move mountains but not section boundary lines.

“All of this violates one of the fundamentals of surveying. It neither touches nor purports to touch one of the landmarks or monuments on the Shooters Hill line, although some of them are as plain today as they were in 1837.

Established, they fix this line, and so established, it cannot possibly be changed by the lines of other surveys. No amount of evidence can change a right line from A to B where A and B are ascertained monuments.

Here we have no question of adversary possession and no principle of estoppel can be invoked. Other surveys cannot change it nor can the evidence of witnesses as to the conduct of these landholders and of their predecessors in title. In such circumstances no collateral evidence to support a change has probative value. Faith may move mountains, but neither oral evidence nor ancient surveys have yet shifted a monument once established and still standing.”

*Moody v. Farinholt*, 158 Va. 234, 241, 164 S.E. 258, 261 (Va. 1932).

### **Analysis of Issue “c”:**

The third issue of whether land described as being in a given section can include land actually lying in an adjacent section was addressed by the Supreme Court of Alabama in 1942 where it was clearly and conclusively stated that no act or agreement may take land out of one section and put it in another, and a conveyance of land described to be in one section cannot be taken to include land in another.



"It is of course true that no act or even agreement of the parties can take the land out of section 11 and put it in section 14. And while the boundary line between adjacent land owners may be fixed and changed by agreement or by adverse possession, they cannot relocate a section line as surveyed by the Government surveyors. So that if the land was in section 11 as thus surveyed, it has so remained and still is thus situated. And the parties both treat it so.

**It follows that a conveyance of land described as in section 14 does not on its face include land in section 11."**

*Alford v. Rodgers*, 6 So.2d 409, 410 (Ala. 1942).  
(Emphasis added.)

The Supreme Court of Alabama ruled in 1945 that there is no color of title for land claimed on the other side of a section line, where one's deed specifies that the section line is the boundary.

As pointed out, the record is rather convincing that the Pickett line is the true government line dividing the two tracts and, being so, appellants were without color of title beyond said boundary and whatever desultory acts of possession appellants might have exercised over a small part of the disputed area could not override the claim of appellee. In such circumstances the law regards appellants' possession as "merely transitory for the purpose of doing the acts which are trespasses in the absence of a legal right. Such acts cannot defeat the right of one in the actual or constructive possession under claim of ownership." Bradley et

al. v. Hall, 239 Ala. 544, 546, 547, 195 So. 883, 885; Green v. Marlin, *supra*.

*Lucas v Scott*, 24 So.2d 540, 541 (Ala.1945).

The ruling in Lucas (*supra*) was cited in a Supreme Court of Alabama decision in 1964.

In a boundary dispute where the deeds of the parties show that the true government line is the dividing line between the two tracts, then there is no color of title beyond said boundary in the party claiming adverse possession and the land across said boundary is considered to be in the constructive possession of the legal owner. Lucas v. Scott, 247 Ala. 183, 24 So.2d 540.

*Lay v. Phillips*, 161 So.2d 477,478 (Ala.1964).

s/ Thomas C. Donald  
Thomas C. Donald, Plaintiff  
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APPENDIX

MOTION TO RECONSIDER  
(EXTRACTED PAGES)

IN THE CIRCUIT COURT OF  
DEKALB COUNTY, ALABAMA

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY AND  
CAROL J. KIMBERLEY

CASE NO. 28-CV-2017-900198

FILED ON JULY 7, 2018

Reformatted in compliance with court rules.

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IN THE CIRCUIT COURT OF DEKALB  
COUNTY, ALABAMA

Thomas C. Donald, Plaintiff

v. Case Number CV-2017-900198

James P. Kimberley, Defendant

Carol J. Kimberley, Defendant

**MOTION TO RECONSIDER**

Plaintiff Thomas C. Donald ("Donald") requests that this Court reconsider its Order of June 21, 2018, and further requests the Court order that the location of the section line which determines the boundary between Section 23 and Section 26 of Township 5 South, Range 10 East in DeKalb County, Alabama, is in the location set forth by surveyor Dwight Hawes and that the firebreak or roadway

made the subject of this action is on the property owned by Plaintiff Donald.

The facts and testimony presented to the court do not support the Court's findings. The Court should reconsider its Order and find in favor of Donald because: a) The Court did not follow the procedures required under Alabama law for resolution of issues regarding section lines. b) The Court ignored essential evidence provided by surveyor Dwight Hawes while basing its findings on unsubstantiated contentions and opinions of surveyor Johnny Croft. c) The Court's erred in basing its Order on surveyor Croft's testimony regarding the location of the half-mile point and failed to follow Alabama and Federal law by basing its findings on Croft's testimony about the location of the half-mile point. d) The Court ignored fundamental principles of Alabama law regarding determination of section lines, appearing to base its decision on Alabama caselaw regarding boundary lines rather than section lines and citations to Pennsylvania caselaw that does not support the findings of the Court.

**1. The Court ignored the fundamental principle of Alabama law that determination of Section Lines must follow the U.S. Government Survey, by issuing an order locating a Section Line of a different length and bearing than recorded in the U.S. Government Survey.**

This Court's adjudication of Crane's rock as being a monument on a section line is contrary to long-established Alabama law, because Crane's rock was not referenced to the original government survey by any evidence presented at the trial on June 11, 2018.

“In this state all disputes as to lines of sections and subdivisions thereof are to be governed by the United States Survey and located by reference to the original government survey.” *Mims v. Alabama Power Co.*, 77 So.2d 648, 651 (Ala.1955).

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. See *First Beat Entertainment, LLC v. ECC, LLC*, 962 So.2d 266, 270 (Ala.Civ.App. 2007). 43 U.S.C. § 752 states, in relevant part:

“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.”

43 U.S.C. § 752

Leon Crane's rock is not referenced in the U.S. Government Survey. Accordingly, this Court should not rely on Crane's rock, and should, instead, rely only on evidence referenced to the original government survey.

**2. The Court ignored essential evidence provided by Surveyor Dwight Hawes.**

The line referred to as the Hawes Line during the trial on June 11, 2018, can reasonably be concluded to be at approximately the location of the Section Line. The Hawes Line is referenced to the original government survey in that its west end is the undisputed northwest corner of Section 26 and its east end is exactly the distances from the northwest and southeast corners of Section 26 specified in the field notes and on the plat of the original U.S. Government survey of 1839-40. The Hawes line's bearing is almost exactly due east, as specified in the field notes, and as required by *Title 43 U.S. Code* § 751. The definition of section lines in *43 U.S. Code* § 752 is, "the boundary lines, actually run and marked". Surveyor Hawes could not testify that the Hawes Line was the Section Line because he, and this Court, know that the original location of the Section Line, as "run and marked," can never be known with absolute certainty since the original section corner markers at the end-points of the Section Line no longer exist.

Because the Hawes Line references to and follows the original government survey, the Hawes line unarguably shows that Kimberley's barricade and markers are in Section 23. The Order's conclusion that Kimberley's barricade and markers are in Section 26 improperly ignores Hawes' evidence. Accordingly, this Court should take the information shown by Hawes' survey (Plaintiff's Exhibits 06, 07, and 08) into consideration in its determinations in this case.

**3. The Section Line must be determined by the U.S. Government Survey, not by Johnny Croft's**

**“opinion” of the supposed half-mile point  
which was not part of the Government Survey.**

Croft testified that the plat of the original U.S. Government survey of 1839-40 does not show any corners of half or quarter sections marked for Section 23 or 26. Accordingly, any contention that Crane’s rock marks a half-mile point is of no consequence because Alabama law states that, “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.’” *Dougherty v. Hood*, 78 So.2d 324, 327 (Ala.1954). Thus, according to Alabama law, this Court’s Order should have placed the “mid-point” 47 feet further east than it did, not at the location of the rock which Crane says that he found in his woods. This is an extremely significant failing in the analysis done by this Court, because essentially the Court’s entire argument in its Order is based on Crane’s rock and Croft’s purported and self-serving assessment of it.

However, according to *Dougherty, supra*, the location of the rock is irrelevant because the location of a half-section corner is not to be determined by an ostensible monument of a corner not marked on the survey, but, instead, by calculating the proper position of the half-section corner. Hawes’ calculated mid-point of his one-mile-long Hawes Line agrees exactly with the field notes from the U.S. Government survey of 1839-40 for the Section Line, and should be taken to be the position of the half-section corner. Furthermore, there is no evidence that Crane’s rock is in any way remarkable at all, or is of any significance whatsoever, other than being



simply a rationale for a proponent of the defendants to falsely justify the defendants' contentions. Accordingly, this Court's Order should be brought into compliance with *Dougherty, supra*.

**4. The Court may not base its decision on surveyor Johnny Croft's unsubstantiated and erroneous contentions as to the location of the Section Line.**

There is no record that Croft testified (as this Court contends in its Order) at the trial of June 11, 2018, that, "In performing the 2009 survey for defendants, he used [the northwest corner of Section 26] and the original government survey field notes and ran a line east to a point where he located an existing stone which he determined to be the half-mile point of the Section line and the Northwest corner of defendants' property, and he put a metal pin there." If Croft actually did what the Court contends that he testified that he did, then this certainly casts doubt on Croft's abilities and skills as a surveyor, because it was shown incontrovertibly by surveyor Dwight Hawes that Crane's rock is 47 feet less than a half-mile from the northwest corner of Section 26 and on a bearing of 1.38 degrees north of due east. Thus, the actual location of Crane's rock is significantly different from the location of the half-mile point noted in the original government field notes: a half-mile due east of the northwest corner of Section 26. This strongly suggests that Croft, in fact, did not follow the original government field notes in his 2009 survey.

Defendant's Exhibit 3, the plat of the survey performed by Croft for the defendants during 2009,

does not show that a line was run from the northwest corner of Section 26 to the northwest corner of the land claimed by the defendants (Crane's rock). It would have required substantial work and expense to run such a line approximately a half-mile long, using Croft's optical surveying equipment, from the northwest corner of Section 26 to Crane's rock, and it is inconceivable that documentation of this task, and the distance and bearing measured, would have been omitted from Croft's plat, if Croft actually did what the Court's Order assumed that Croft did.

Accordingly, it appears that this Court's presumption that Croft ran such a line is incorrect, and that Croft cannot possibly have an "opinion" about Crane's rock based on its location. Accordingly, Croft's purported "opinion" should be ignored by this Court, and it should certainly not be used as the foundation for this Court's judgment.

Croft's actual testimony about Crane's rock at the trial of June 11, 2018, shown in Exhibit "A" of this motion, does not corroborate this Court's assertions about Croft's testimony. Instead, Croft actually testified, at Page 23 Line 3, regarding the basis of his "understanding" about what Crane's rock marked, "He gave me a copy of his deed and he said go survey this and I found this and it matches with his other calls pretty close. I had no reason to doubt that this was the half-mile point." Thus, it is clear that Croft's "understanding" and "professional opinion" about Crane's rock was not based on references to the original U.S. Government survey of 1839-40. Accordingly, for these reasons, this Court should not have based its Order on its unsubstantiated contentions about Croft's "professional opinion".

APPENDIX

MOTION TO RECONSIDER  
ORDERS MOVING SECTION LINE  
(EXTRACTED PAGES)

IN THE CIRCUIT COURT OF  
DEKALB COUNTY, ALABAMA

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY AND  
CAROL J. KIMBERLEY

CASE NO. 28-CV-2017-900198

FILED ON JANUARY 27, 2019

Reformatted in compliance with court rules.

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**IN THE CIRCUIT COURT OF  
DEKALB COUNTY, ALABAMA**

Thomas C. Donald, Plaintiff

v.

Case Number CV-2017-900198

James P. Kimberley, Defendant

Carol J. Kimberley, Defendant

**MOTION TO RECONSIDER ORDERS MOVING  
SECTION LINE**

Plaintiff Thomas C. Donald ("Donald") respectfully requests that this Court reconsider its decision to move the boundary line (the "Section Line") between Section 23 and Section 26 in Township 5 South of Range 10 East in DeKalb County, Alabama.

**1. This Court's decision was not final.**

In this Court's Order of June 21, 2018, which was affirmed in its Order of August 9, 2018, this Court concluded that the Section Line was located differently from what was determined during the original survey by the U.S. Government during 1839-40.

In its Order of July 23, 2018, this Court declined to affirm that its Order of June 21, 2018, was not final; therefore Donald filed a notice of appeal of the June 21<sup>st</sup> Order on July 31, 2018. However, the Alabama Court of Civil Appeals denied Donald's appeal on January 11, 2019, based on that court's conclusion that this Court's orders regarding the location of the Section Line, appealed by Donald, were, in fact, not final. Attached as Exhibit "A" is the opinion denying Donald's appeal. Attached also as Exhibit "B" are two letters from Donald to the Reporter of Decisions regarding a misunderstanding expressed in the opinion.

**2. This Court's decision is not supported by Alabama law.**

"In this state, the lines of sections and subdivisions thereof, are to be located by the original government survey." *Taylor v. Fomby*, 22 So. 910, 912 (Ala.1897). Disputes regarding the location of a section line shall be resolved only with reference to the original U.S. Government survey. *Mims v. Alabama Power Company et al.*, 77 So.2d 648, 651 (Ala.1955). This Court disregarded these mandates

and located a section line with indifference to the original Government survey.

This Court's orders disregarded the original U.S. Government survey of 1839-40 which shows that the Section Line is 5,280 feet long and that it runs due east. The section line ordained by this Court is only 5,186 feet long and runs 1.40 degrees north of due east. This Court's orders effectively move the northeast corner of Section 26 to the west by 94 feet and to the north by 112 feet, changing long established lines in the four sections which share this corner. Section lines established by the United States government may not be moved. See *North Clark Water Authority v. Dockery*, 5 So.3d 634, 636 (Ala.Civ.App.2008).

The section line ordained by this Court on June 21, 2018, is inconsistent with the Section Line described in the government survey. According to the field notes and the plat of the government survey, in conjunction with the undisputed locations of the northwest and southeast corners of Section 26, the correct location of the Section Line is along the green Hawes Line shown by Surveyor Hawes' plat and by measurements illustrated in the attached Exhibit "C" which were included in the evidence presented at the trial of this case held on of June 11, 2018. The relocated section line ordained by this Court is shown as the red Croft Line on Exhibit "C".

This Court acted improperly because none of this Court's eight surviving findings, as stated in its orders of June 21, 2018, and August 9, 2018, reference the original U.S. Government survey, which is required to justify a decision regarding the

location of a section line. See *Mims, supra*. This Court's orders do not, and cannot, cite any law otherwise justifying its decision regarding the location of the disputed line.

This Court's ruling is in error and should be revised. The location of the Section Line claimed by Donald in accordance with the records of the U.S. Government Survey of 1839-40, shown by Surveyor Dwight Hawes' measurements and testimony presented to this Court, and in compliance with Alabama law, should be accepted.

APPENDIX

APPELLANT'S BRIEF  
(EXTRACTED PAGES)

IN THE ALABAMA COURT OF CIVIL APPEALS

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY AND  
CAROL J. KIMBERLEY

CASE NO. 2190017

FILED ON OCTOBER 8, 2019

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ARGUMENT

1. The trial court's orders are not based on the original U.S. Government survey.

The trial court, in its *Order* of June 21, 2018, falsely found that Surveyor Croft "in performing the 2009 survey for defendants used [the northwest corner of Section 26] and the original government survey field notes and ran a line east to a point where he located an existing stone which he determined to be the half-mile point of the Section Line and the northwest corner of defendants' property, and he put a metal pin there." (C.036-037)

In its subsequent *Order* of August 9, 2018, the trial court admitted that it was "in error" in making the above-stated finding, and it ordered this crucial finding to be struck from its *Order* of June 21, 2018.

(C.053) This left the trial court with no justification at all for its ruling that the Section Line ran along the Kimberleys' new line of boundary markers, north of Donald's Road, because such a conclusion could no longer be based on references to the original U.S. Government survey of 1839-40, as Alabama law required. See *Mims v. Alabama Power Company et al.*, 77 So.2d 648, 651 (Ala.1955).

Furthermore, the trial court's only citations of law in its *Order* of June 21, 2018, were shown to be misapplied. See attached Exhibit "D" and Donald's *Motion to Reconsider* (C.038-048) filed on July 7, 2018. The trial court did not even address these failings in its *Order* of August 9, 2018.

The trial court stated one surviving finding in its *Order* of June 21, 2018, and it added seven more findings in its *Order* of August 9, 2018. However, as will be shown in the *Findings* section (5) below, none of these eight secondary findings by the trial court complies with Alabama law as a basis for the trial court's determination regarding the location of the section line.

The next section (2) below shows that a finding must relate to the original survey by the U.S. Government or the finding cannot be a basis for determining the location of a section line. The two sections (3 and 4) thereafter show how the trial court's decision is in further conflict with Alabama law. It will then be shown in section 5 how each of the eight additional findings fails to relate to the original survey of 1839-40 by the U.S. Government. The final section (6) below shows how this case is equivalent to a case recently reversed by this appellate court.



**2. The original U.S. Government survey governs the locations of all section lines in Alabama.**

“The general rule is that all disputes as to the boundaries of land are governed by the United States surveys, unless there is some statute of the state to the contrary; and the United States statutes make the field notes and plats of the original surveyor, the primary and controlling evidence of boundary. *Tied. Real Prop.* § 832; *24 Am. & Eng. Enc. Law*, 1002. 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.” *Taylor v. Fomby*, 22 So. 910, 912 (Ala.1897). *See also Guyse v. Chappell*, 367 So.2d 944, 946 (Ala.1979) (stating that “[o]ur cases are clear that no agreement or act ... can relocate the section lines, or interior subdivision lines established by government survey, for they are certain in legal contemplation”); *Mims v. Alabama Power Co.*, 262 Ala. 121, 77 So.2d 648 (1955); *McNeil v. Hadden*, 261 Ala. 691, 76 So.2d 160 (1954); *Upton v. Read*, 256 Ala. 593, 56 So.2d 644 (1952); *Wilson v. Cooper*, 256 Ala. 184, 54 So.2d 286 (1951); *Alford v. Rodgers*, 242 Ala. 370, 6 So.2d 409 (1942); and *Dial v. Bond*, 849 So.2d 189 (Ala.Civ.App.2002).

According to the original U.S. Government survey of Section 26 in 1839-40, and its undisputed corner locations:

a. The northwest corner of Section 26 is at a point marked by a railroad spike at the end of DeKalb County Road 642, as shown on the Hawes Plat. (R.031, R.066)

- b. The southeast corner of Section 26 is at a point marked by an ancient rock monument, as shown on the Hawes Plat as a planted rock. (R.064-065)
- c. The length of the northern boundary line of Section 26 (the Section Line) is 5,280 feet (80 chains), as shown in the field notes and on the plat of the U.S. Government survey of 1839-40. (R.034, R.036, R.077)
- d. The length of the eastern boundary line of Section 26 is 5,280 feet (80 chains), as shown in the field notes and on the plat of the original U.S. Government survey of 1839-40. (R.036, R.077)
- e. A half-section corner is NOT shown on the Section Line on the plat of the original U.S. Government survey of 1839-40. (R.037)
- f. The Section Line is shown to run due east in the field notes of the original U.S. Government survey of 1839-40. (R.036)

In compliance with the requirements specified in *Mims v. Alabama Power Company et al.*, 77 So.2d 648, 651 (Ala.1955), Hawes determined the location of a northeast corner (the "Hawes Corner") which is 5,280 feet east of the northwest (railroad spike) corner of Section 26 and 5,280 feet north of the southeast (ancient planted rock) corner of Section 26. See Plaintiff's Trial Exhibit 06. (C.086) The Hawes Corner is, in essence, a re-establishment of the northeast corner of Section 26 in accordance with the original U.S. Government survey. It turned out to be only fifteen feet further north than the northwest (railroad spike) corner of Section 26, a mile to the west. This resulted in the Hawes Line having a bearing of only approximately one-sixth (0.16) of one degree north of the due east bearing described in the field notes of the U.S. Government survey. That this is only an immaterial deviation from due east further

validates the undisputed locations of the monuments at the northwest and southeast corners of Section 26. See Fact-8.

The location of the Hawes Line comports with the location of the Section Line described in the original U.S. Government survey of 1839-40.

**3. Internal corners were not established during the original survey, and cannot be used by the trial court in determining the location of the Section Line.**

A half-section corner is not shown on the Section Line on the plat of the original U.S. Government survey. (R.37)

“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.’” *Dougherty v. Hood*, 78 So.2d 324, 327 (Ala.1954). See also *Nolen v. Palmer*, 24 Ala. 391 (Ala.1854); *Clark on Surveying and Boundaries* (2d Ed.) section 348, note 32; *Billingsley v. Bates*, 30 Ala. 376 (Ala.1857).

In compliance with U.S.C.A., Title 43, § 752, cited in *Dougherty, supra*, the half-section corner shown on the Hawes Plat as the mid-point of the Hawes Line is exactly equidistant from the two ends of the Hawes Line, a half-mile distance (2,640 feet) in agreement with the field notes and plat of the original U.S. Government survey of 1839-40. See attached Exhibit “A”.

With indifference to Alabama law, the trial court determined the half-section point to be only 2,593 feet from the railroad spike (see Fact-9 and point-C on attached Exhibit “A”) marking the northwest corner of Section 26, significantly at variance from the proper distance of 2,640 feet based on the original U.S. Government survey and the rule in *Dougherty, supra*. This error, alone, invalidates the trial court’s ruling.

**4. The trial court failed to rely upon the best evidence, resulting in mislocation of the Section Line.**

“[U.S.C.A., Title 43, §§ 751-3] contemplate, that where the survey has been made and returned, that it shall be held to be mathematically true, as to the lines run and marked, the corners established, and the contents returned. ... Should they be obliterated or lost, recourse must then be had to the best evidence, which can be obtained, showing their former situation or place.” *Lewen v. Smith*, 7 Port. 428, 433 (Ala.1838). (Emphasis added.)

The best evidence which can be obtained which is related to the original government survey is the evidence presented at the trial of June 21, 2018. This evidence is expressed in the Hawes Plat (Plaintiff’s Trial Exhibit 06 (C.086)) and in attached Exhibit “A” which shows that the Section Line is located south of the Road, and that the Kimberleys’ barricade and line of new boundary markers are on Donald’s land in Section 23. At the trial, no contradictory measurements were presented, and there was no suggestion that any better evidence locating the Section Line exists.

The trial court erred egregiously in ignoring the best evidence which was obtained and was available for its consideration in determining the location of the Section Line.

**5. The findings by the trial court are not pertinent, because they are NOT based on the original U.S. Government survey.**

There were originally nine findings in the trial court's two orders. The trial court admitted that its initial, crucial, finding in the *Order* of June 21, 2018, was false, and it struck this determinative finding by its *Order* of August 9, 2018. As shown below, none of the remaining eight findings in the trial court's two orders relate to the original U.S. Government survey, as is required in determining the location of a section line. See *Mims v. Alabama Power Company et al.*, 77 So.2d 648, 651 (Ala.1955).

APPENDIX

PETITION FOR WRIT OF CERTIORARI  
IN THE SUPREME COURT OF ALABAMA

THOMAS C. DONALD

V.

JAMES P. KIMBERLEY AND  
CAROL J. KIMBERLEY

CASE NO. 1200245

FILED ON JANUARY 25, 2021

Reformatted in compliance with court rules.

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**THOMAS C. DONALD**

**Plaintiff / Appellant / Petitioner**

**v.**

**JAMES P. KIMBERLEY AND**

**CAROL J. KIMBERLEY**

**Defendants / Appellees / Respondents**

**CIRCUIT COURT OF DEKALB COUNTY**

**CASE No. 28-CV-2017-900198**

**COURT OF CIVIL APPEALS CASE No. 2190017**

**SUPREME COURT CASE No. \_\_\_\_\_**

**APPELLANT'S PETITION FOR A WRIT OF  
CERTIORARI**

**TO THE SUPREME COURT OF ALABAMA: Comes  
your Petitioner, Thomas C. Donald, and petitions**

this Court for a writ of certiorari to be issued to the Court of Civil Appeals in the above-styled cause under Rule 39(a)(1)(D)(2) of the Alabama Rules of Appellate Procedure, and shows the following:

1. JUDGMENT SUFFERED. Petitioner suffered a judgment in the Circuit Court of DeKalb County, Alabama, in Case No. 28-CV-2017-900198, on June 21, 2018, as amended on August 9, 2018. The judgment changed the length and bearing of a section line from the values reported in the original survey by the U.S. Government.

2. JUDGMENT AFFIRMED. The Court of Civil Appeals, in Case No. 2190017, affirmed the judgment on September 11, 2020. A copy of the order by the Court of Civil Appeals is attached to this petition. The Court of Civil Appeals did not issue an opinion. The citations in the order suggested that the judgment was affirmed because lay testimony by a neighbor about a rock marking a property corner was not in the record on appeal.

3. REHEARING DENIED. A request to supplement the record on appeal was filed on September 14, 2020, and was denied on September 21, 2020. An application to the Court of Civil Appeals for rehearing was filed on September 25, 2020. The application was overruled on January 8, 2021. A copy of the order by the Court of Civil Appeals is attached to this petition. The Court of Civil Appeals did not issue an opinion.

4. CONFLICTS WITH PRECEDENTS. The decision by the Court of Civil Appeals affirmed the relocation of a U.S. Government section line. The affirmation

conflicts with prior decisions by the Supreme Court, and conflicts with prior decisions by the Court of Civil Appeals, and conflicts with the U.S. Government Survey of 1839-40, and conflicts with existing property boundaries which have been long based upon the original government survey of 1839-40. These conflicts constitute grounds for issuance of a writ of certiorari. Rules 39(a)(1)(D)(2) and 39(d)(3)(B) of the Alabama Rules of Appellate Procedure are applicable as a basis for this petition. The conflicts are shown with particularity in section 6, below, following the statement of facts in section 5, next.

5. STATEMENT OF FACTS. Petitioner hereby verifies that the following statement of facts is a verbatim copy of the statement of facts presented to the Court of Civil Appeals in the application for rehearing.

FACT 1. Donald's land is in Section 23, Township 5 South, Range 10 East, in DeKalb County, Alabama, as described in Deed Book 773 at Page 206 in the Probate Office of DeKalb County, Alabama. (C.036)

FACT 2. The Kimberleys' land is in Section 26, adjacent to and south of Donald's land, as described in Deed Book 717 at page 165 in the Probate Office of DeKalb County, Alabama. (C.036)

FACT 3. The northeast corner of the Town of Mentone, Alabama, is the northwest corner of Section 26. See Plaintiff's Trial Exhibit 01. (C.081) On this map, the Kimberleys' land is marked with a "K" and Donald's land is marked with a "D".

FACT 4. The Kimberleys only own land in Section 26, and do not own land in Section 23, which lies to the north, where Donald owns land. (C.008-



010) The boundary between Donald's land and the Kimberleys' land is the Section Line. (C.036)

FACT 5. The location of the northwest corner of Section 26 was re-established during 1996 by surveyor Johnny Croft. (R.25:L17-21) This undisputed location of the northwest corner of Section 26 is monumented with a railroad spike set in the asphalt topping of DeKalb County Road 642 near its western end where it intersects DeKalb County Road 631. (R.26-27) See Plaintiff's Trial Exhibit 02. (C.082)

FACT 6. The undisputed southeast corner of Section 26 is monumented with an ancient planted rock (also sometimes referred to as a rock pile) shown in Plaintiff's Trial Exhibit 12. (C.092)

FACT 7. The north and east sides of Section 26 are each 5,280 feet (80 chains) long. See the plat (Plaintiff's Trial Exhibit 03 (C.083)) and the field notes (Plaintiff's Trial Exhibit 04 (C.084)) from the original U.S. Government survey of 1839-40. (R.34-36, R.76-78) A half-section corner is not shown on the Section Line on the plat of the original U.S. Government survey. (R.37) The Section Line runs due east from the northwest corner of Section 26, marked with Croft's railroad spike, as shown in the field notes of the original U.S. Government survey. (R.36)

FACT 8. Surveyor Dwight Hawes measured the location of the Kimberleys' barricade and new markers with respect to the "Hawes Line", the green line on Exhibit "B" attached to Appellant's Brief filed on December 12, 2019. The Hawes Line runs from the undisputed northwest corner of Section 26 for 5,280 feet to a point 5,280 feet north of the undisputed southeast corner of Section 26. (R.77-78)

FACT 9. Hawes' plat (the "Hawes Plat") of his measurements is shown in Plaintiff's Trial Exhibit 06 (C.086), and an enlargement of the central part of the Hawes Plat is shown in Plaintiff's Trial Exhibit 07 (C.087), and an overlay of this enlargement on an aerial photograph of the area is shown in Plaintiff's Trial Exhibit 08 (C.088). A copy of Plaintiff's Trial Exhibit 08 is attached to Appellant's Brief filed on December 12, 2019, as Exhibit "A". The Hawes Line is shown on the Hawes Plat to run approximately one-sixth (0.16) of a degree north of due east. (C.087) This bearing is not materially different from due east.

FACT 10. In its Order of August 9, 2018, the Trial Court "reaffirms its statement in the order of June 21, 2018, that Surveyor Croft upon locating the existing stone determined it to be the half-mile point of the Section line, and the Northwest corner of defendants' property." (C.053)

FACT 11. Surveyor Croft testified that he set an iron pin at the stone (R.40), and he understood that the stone was half way between the railroad spike and the next section corner (R.42). The location of this stone, shown as point-C on Exhibit "A" attached to Appellant's Brief filed on December 12, 2019, is 2,593.2 feet east of the railroad spike marking the northwest corner of Section 26, which is 46.8 feet less than the half-mile Croft had "determined".

FACT 12. Hawes' description of the Hawes Line matches the description of the Section Line in the U.S. Government survey of 1839-40, but the line adjudicated by Judge Cole in his order of June 21, 2018, is substantially different. Judge Cole's line is 94 feet shorter than the U.S. Government survey Section Line, and it runs easterly at an

extraordinary bearing of 1.40 degrees north of the due east bearing recorded during the U.S. Government survey of 1839-40. See Exhibit "B" and Exhibit "C" attached to Appellant's Brief filed on December 12, 2019.

FACT 13. There are substantial distances between points on the Hawes Line and associated points on the Kimberleys' barricade and markers: (a) the eastern end of the Kimberleys' line of new boundary markers (point-A on Exhibit "A" attached to Appellant's Brief filed on December 12, 2019) is 60.3 feet north of the Hawes Line (the dashed line on said Exhibit "A"); (b) the southern end of the Kimberleys' barricade on the Road (point-B on said Exhibit "A") is 13.3 feet north of the Hawes Line; and (c) the western end of the Kimberleys' line of new boundary markers (point-C on said Exhibit "A", the northwest corner of the land claimed by the Kimberleys) is 46.8 feet west of the mid-point of the Hawes Line and 56.1 feet north of the Hawes Line. (R.070-074)

FACT 14. The Trial Court stated the following in its *Order* of August 9, 2018. "An adjoining landowner, Leon Crane, testified that the corner identified by Croft's survey had been recognized for over forty years as the Northwest corner of the property now owned by defendants. The Hawes line, however, runs through an existing shed on Crane's property." (C.053) There is no other reference to Leon Crane in any Trial Court Order related to its decision regarding the location of the Section Line.

FACT 15. "Where the location of section lines, or their subsidiaries, is in dispute, a witness who is not an expert surveyor may testify to existing and visible lines and monuments which have been adopted or assented to by adjacent owners, but he

cannot, upon such knowledge alone, give his opinion as to what is the true line.” *Pounders v. Nix*, 130 So. 537, 539 (Ala.1930), which was cited by *Williams v. Laubenthal Land & Timber*, 941 So.2d 301, 305 (Ala.Civ.App.2006), which was cited by the Alabama Court of Civil Appeals in its Decision of September 11, 2020, in this case 2190017.

FACT 16. The Trial Court, in its *Order* of June 21, 2018, erroneously found that Surveyor Croft “in performing the 2009 survey for defendants used [the northwest corner of Section 26] and the original government survey field notes and ran a line east to a point where he located an existing stone which he determined to be the half-mile point of the Section Line and the northwest corner of defendants’ property, and he put a metal pin there.” (C.036-037) In its subsequent *Order* of August 9, 2018, the Trial Court admitted that it was “in error” in making the above-stated finding, and it ordered this crucial but erroneous finding to be struck from its *Order* of June 21, 2018. (C.053) The Trial Court made no other finding that Croft made any measurements related to the U.S. Government survey of the Section Line. Its decision was, therefore, unjustified.

FACT 17. Alabama law requires that all disputes regarding the location of a section line be governed by the United States Survey and that a section line must be located by reference to its original U.S. Government survey. See *Mims v. Alabama Power Company et al.*, 77 So.2d 648, 651 (Ala.1955).

## 6. CONFLICTS STATED WITH PARTICULARITY.

The affirmation by the Court of Civil Appeals of the trial court’s orders is in conflict with Supreme Court precedent because none of the findings on which the

trial court's determination of the location of the north line of Section 26 (the "Section Line") was based relate to the original 1839-40 survey by the U.S. Government. See Fact 16, above. In essence, the trial court moved a section line, and Alabama law requires that a section line must be located by reference to the original U.S. Government survey. "In this state all disputes as to lines of sections and subdivisions thereof are to be governed by the United States Survey and located by reference to the original government survey. *Taylor v. Fomby*, 116 Ala. 621, 22 So. 910; *Billingsley v. Bates*, 30 Ala. 376. ... "And while the boundary line between adjacent landowners may be fixed and changed by agreement or by adverse possession, they cannot relocate a section line as surveyed by the government surveyors." *McNeil v. Hadden*, supra [261 Ala. 693, 76 So.2d 162]." *Mims v. Alabama Power Company et al.*, 77 So.2d 648, 651 (Ala.1955).

The affirmation by the Court of Civil Appeals of the trial court's orders is also in conflict with Supreme Court precedent because the trial court did not follow Alabama law by considering the measurements made by surveyor Dwight Hawes based on the distances recorded during the original U.S. Government survey of 1839-40. These measurements are evidence of the location of the Section Line. No contradicting evidence of the location of the Section Line, based on the original government survey, was cited by the trial court in its orders. Alabama law requires that the best evidence available must be considered in determining the location of a section line. See *Lewen v. Smith*, 7 Port. 428, 433 (Ala.1838).

The affirmation by the Court of Civil Appeals of the trial court's orders moving the Section Line conflicts with a relatively recent decision by the Court of Civil Appeals itself. In *North Clark Water Authority v. Dockery*, 5 So.3d 634, 636 (Ala.Civ.App.2008), *Mims, supra*, is cited: "In this state all disputes as to lines of sections and subdivisions thereof are to be governed by the United States Survey and located by reference to the original government survey." *Mims v. Alabama Power Co.*, 262 Ala. 121, 124, 77 So.2d 648, 651 (1955). Although a boundary line between adjacent landowners may be fixed or changed by agreement or by adverse possession, neither process can "relocate a section line as surveyed by the government surveyors."

The Court of Civil Appeals' affirmation of the trial court's relocation of the section line conflicts with aspects of the Section Line originally described in the field notes and on the plat of the U.S. Government survey of 1839-40. See Fact 12, above. The trial court's orders effectively reduced the length of the Section Line by 94 feet and changed its bearing by 1.40 degrees from the length and bearing recorded in the original government survey. The trial court, thereby, moved the northeast corner of Section 26 to the west by 94 feet and to the north by 112 feet, changing long-established property boundary lines in the four sections which share this section corner. "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.*

The affirmation by the Court of Civil Appeals of the trial court's orders, on the premise that the testimony of Leon Crane might be relevant to the location of the Section Line, is in conflict with Supreme Court precedent. Omission of this testimony from the record on appeal is harmless. Petitioner has requested and should be allowed to supplement the record with the omitted testimony. The trial court's orders state that Crane's testimony, which is not in the record on appeal, relates to a property corner, but the trial court's orders do not suggest that Crane's testimony relates to the U.S. Government survey of the Section Line or, otherwise, to the location of the Section Line. The trial court's orders describe Crane as a "neighboring landowner", and do not suggest that he is an expert surveyor like Hawes or Croft. See Fact 14, above. "Where the location of section lines, or their subsidiaries, is in dispute, a witness who is not an expert surveyor may testify to existing and visible lines and monuments which have been adopted or assented to by adjacent owners, but he cannot, upon such knowledge alone, give his opinion as to what is the true line." *Pounders v. Nix*, 130 So. 537, 539 (Ala.1930).

WHEREFORE, Petitioner respectfully requests that, after a preliminary examination, the writ of certiorari be issued, and that this Court proceed under its rules to review the matters complained of, and that the judgment of the Court of Civil Appeals

be reversed, and that the location of the Section Line be ordered to be in accordance with the original U.S. Government Survey of 1839-40, and that such other relief as Petitioner may be entitled be ordered.

REL: September 11, 2020

STATE OF ALABAMA – JUDICIAL DEPARTMENT  
THE COURT OF CIVIL APPEALS  
SPECIAL TERM, 2020

2190017

Thomas C. Donald v. James P. Kimberley  
and Carol J. Kimberley.  
Appeal from DeKalb Circuit Court (CV-17-900198).

PER CURIUM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.; Williams v. Clark, 263 Ala. 228, 228, 82 So. 2d 295, 295-296 (1955); Williams v. Laubenthal Land & Timber Co., 941 So. 2d 301, 303-304 (Ala. Civ. App. 2006); and Ezell v. Ezell, 440 So. 2d 560, 562 (Ala. Civ. App. 1983).

All the judges concur.



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**The Court of Civil Appeals**

[Seal of the State of Alabama]

REBECCA C. OATES      MEG WILLIAMS FIEDLER  
CLERK                      ASSISTANT CLERK

300 DEXTER AVENUE  
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January 8, 2021

**2190017**

**Thomas C. Donald v. James P. Kimberley and  
Carol J. Kimberley (Appeal from DeKalb  
Circuit Court CV-17-900198)**

**You are hereby notified that the following  
action was taken in the above cause by the  
Court of Civil Appeals:**

**Application for Rehearing Overruled. No  
opinion on rehearing.**

**Thompson, P.J., and Moore, Donaldson,  
Edwards, and Hanson, JJ., concur.**

**s/ Rebecca C. Oates  
Rebecca C. Oates  
Clerk, Court of Civil Appeals**