

CHAPTER 3
ACQUISITION OF RIGHTS-OF-WAY BY PRIVATE PARTIES

Article 1

Right-of-Way to Public Road or Highway

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Article 2

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ARTICLE 1

RIGHT-OF-WAY TO PUBLIC ROAD OR HIGHWAY

§ 18-3-1. Right-of-way; acquiring.

The owner of any tract or body of land, no part of which tract or body of land is adjacent or contiguous to any public road or highway, shall have and may acquire a convenient right-of-way, not exceeding in width 30 feet, over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto provided written approval is obtained from the municipal government and the planning board of such municipality.

History. Acts 1982, 1st Ex. Sess., No. 82-784.
Cross references. — Constitutional provisions regarding eminent domain, Const. Ala., art. I, § 23 and art. XII, § 235.
Evans: Property Rights. — § 40.4, n. 16.2.

§ 40.12, n. 271.
§ 40.12(a), n. 276.
§ 40.12(c), n. 281.
Howell: Practice Forms. — §§ 3-13-1, 3-13-2.

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General comment.

A right of way cannot be acquired under this article if the petitioner has sufficient access from his land to a public road or highway by means of either a private or public right of way; also, that if a sufficient way across defendant's

land is in use by petitioner and his right to use such way is not questioned, but is recognized, by the defendant, the petitioner cannot acquire, under said statutory provisions, another right of way across defendant's land. Southern Ry. v. Hall, 267 Ala. 143, 100 So. 2d 722 (1957).

Property owner may institute a proceeding under this section if he does not have a way of access to a public road, either public or private, which is unobstructed and unquestioned. Crabtree v. Tew, 485 So. 2d 726 (Ala. Civ. App. 1985).

Constitutionality.

Where owners of a landlocked parcel of land petitioned the probate court for the condemnation of a right-of-way across privately owned intervening land to the nearest and most convenient public road, such condemnation was not unconstitutional to the extent that it permits the taking of private property to establish a private easement by necessity, provided that there existed a valid public purpose for the

taking as there is no literal requirement that condemned property be put into use for the general public. *Lockridge v. Adrian*, 638 So. 2d 766 (Ala. 1994).

Burden of proof.

The purpose of this statute was not to do more than to assure that land which is not adjacent or contiguous to a public road or highway can be reached from such a road or highway. In other words, the burden is on the petitioner for a right of way to show that he has no reasonably adequate outlet. *Southern Ry. v. Hall*, 267 Ala. 143, 100 So. 2d 722 (1957).

Construction with other law.

Where appellants contended that the trial court erred in failing to require the appellee to make an offer of purchase of the land to be condemned before initiating the proceeding, as required by section 18-1A-55, to be read in conjunction with section 18-1A-22 and 18-1A-23, although the appellee did not comply with section 18-1A-22, that section did not apply to the purchase of the land in question which was governed by chapter 3 of title 18 titled "Acquisition of Rights-of-Way by Private Parties" and was the chapter under which the appellee proceeded to institute this action. *Williams v. Deerman*, 587 So. 2d 381 (Ala. Civ. App. 1991).

Section 18-1A-293 overrides, in condemnation cases under § 18-3-1 et seq., the customary discretion vested in the trial judge under the Rules of Civil Procedure to assess costs to either party. *Brothers v. Holloway*, 692 So. 2d 845 (Ala. Civ. App. 1997).

"Easement by necessity".

The trial court can not grant an easement by necessity, where there is no proof in the record of unity of ownership of the two parcels and where the defendants' property is adjacent to a public road. *Gowan v. Crawford*, 599 So. 2d 619 (Ala. 1992).

Evidence — Admissible.

The court did not err by admitting at trial evidence showing that a way across the land of another, not a party to the litigation, would have resulted in less inconvenience and damage to the nonparty than would have resulted to the defendants if their property was condemned. *DeWitt v. Stevens*, 598 So. 2d 849 (Ala. 1992).

Evidence — Sufficient.

Evidence, including the trial judge's viewing of the property, was sufficient to show that plaintiff was entitled to condemn right-of-way across defendant's land to allow access to public road because private logging road did not provide the plaintiff with a reasonably adequate way to and from the public road. *Tenison v.*

Forehand, 281 Ala. 379, 202 So. 2d 740 (1967).

It was not error to condemn right-of-way over condemnee's land, particularly where trial court personally inspected the property and found that the condemnors did not have reasonably adequate access to any public road or highway by other routes and that the condemned route was the best route from the condemnors' land to the public highway. *Tate v. Loper*, 459 So. 2d 892 (Ala. Civ. App. 1984).

In condemnation proceeding to acquire convenient right-of-way, evidence indicated that route of access over defendant's property was nearest and most convenient, and supported trial court's decision to grant 420-foot-long right-of-way along the old roadbed on defendant's property. *Crabtree v. Tew*, 485 So. 2d 726 (Ala. Civ. App. 1985).

Condemnation of the property involved was necessary as the record contains evidence from which the trial court could determine that the petitioners had no right-of-way which was unobstructed or adequately reasonable. Additionally, the trial court had maps and surveys before it indicating that the route over petitioner's property was the nearest and most convenient to a public road. *Otto v. Gillespie*, 572 So. 2d 495 (Ala. Civ. App. 1990).

Jurisdiction.

Court could not condemn the right of way in the equity court where the statutes plainly provide that such condemnation must be had in the circuit court, where an appeal is taken from the probate court. *McCurdy v. Samples*, 262 Ala. 485, 80 So. 2d 224 (1955).

Legislative intent.

The legislature intended to permit landlocked owners in municipalities to obtain private rights-of-way over the lands of others to the nearest public road or street and did not intend to deprive landlocked owners outside municipalities of the same right, which they had possessed for many years. *Hawkins v. Griffin*, 512 So. 2d 109 (Ala. Civ. App. 1987).

"Public road".

Plaintiff's action to condemn under this section was disallowed where evidence showed existence of a public road which connected plaintiff's land to main highway, even though that public road had not been used for seven to 10 years and was obstructed in several places by fallen trees. *Davenport v. Cash*, 261 Ala. 380, 74 So. 2d 470 (1950).

Release.

Agreement of landowner bounded on three sides by water to release his right to a way over the adjoining land did not contravene public policy. *Sayre v. Dickerson*, 278 Ala. 477, 179 So. 2d 57 (1965).

Requirements.

The fact that a public road or highway access is not as desirable as another route would be a matter of public purpose of giving title to a public road or highway. The statute for condemnation across the interver Hall, 267 Ala. 143,

This section does not require that one citizen or corporation as a matter of public purpose be a real necessity before a citizen can be done at all. In both landowners, a condemnation, is a determining whether way over a person's property. 598 So. 2d 849 (Ala. 1992).

Title.

This section eliminates the right of title in certain limits of a municipal corporation. Ala. 477, 179 So. 2d

When applicable.

The obvious purpose of the statute is to provide a means by which a landowner can get relief by condemnation across intervening land to and from his land. The statute is not reasonably adequate if it may acquire a private convenient right of way fifteen feet over the land between such tract and public road nearest to Southern Ry. v. Hall, 722 (1957).

This section does not apply to park property. Aland 250 So. 2d 677 (1971).

Private condemnation is not applicable to a property

§ 18-3-2. Right-

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 78 Ala. 477, 179 So.

Requirements.

The fact that a presently existing means of access is not as desirable to the landowner as another route would be is not the test; if an existing access is reasonably adequate for the purpose of giving the landowner an outlet to a public road or highway, there is no basis under the statute for condemning another outlet across the intervening land. *Southern Ry. v. Hall*, 267 Ala. 143, 100 So. 2d 722 (1957).

This section does not contemplate granting one citizen or corporation a right-of-way through the property of another citizen or corporation as a matter of mere convenience or as a mere matter of saving expense. There must be real necessity before private property can be invaded by a citizen for private purposes, if that can be done at all. The physical convenience of both landowners, not just the person seeking condemnation, is a material consideration in determining whether to condemn a right-of-way over a person's property. *DeWitt v. Stevens*, 598 So. 2d 849 (Ala. 1992).

Title.

This section eliminates the requirement of privity of title in certain cases outside corporate limits of a municipality. *Sayre v. Dickerson*, 278 Ala. 477, 179 So. 2d 57 (1965).

When applicable.

The obvious purpose of this statute is to provide a means whereby a landowner, enclosed on all sides by lands of others and unable to get to his land from a public road or highway, can get relief by condemning a right of way to it across intervening land. However, if such landowner already has a reasonably adequate way to and from his land, there is no field of operation for the statute. On the other hand, if there is no reasonably adequate means of access he may acquire, as provided in the statute, a convenient right of way not exceeding in width fifteen feet over the lands intervening and lying between such tract or body of land and the public road nearest or most convenient thereto. *Southern Ry. v. Hall*, 267 Ala. 143, 100 So. 2d 722 (1957).

This section does not apply to state-owned park property. *Aland v. Graham*, 287 Ala. 226, 250 So. 2d 677 (1971).

Private condemnation proceedings are available to a property owner whose property,

though adjacent to an interstate highway, does not have access to it because of highway department regulations. *Loveless v. Joelex Corp.*, 590 So. 2d 228 (Ala. 1991).

If a landowner already has a reasonably adequate way to and from his land, then there is no field of operation for this section; if there is no reasonably adequate means of access, he may acquire a convenient right-of-way. *Loveless v. Joelex Corp.*, 590 So. 2d 228 (Ala. 1991).

Illustrative cases.

Evidence did not show that appellee's use of the "clay pit" crossing was attended with any difficulty except that it connected with his land near its southern portion and not near its center where he proposed to erect his home. No doubt it would be a convenience for appellee to have an outlet nearer the location of his proposed home, but this statute does not authorize the taking of lands of another as a mere matter of convenience. *Southern Ry. v. Hall*, 267 Ala. 143, 100 So. 2d 722 (1957).

Existence of alternative private right of way giving access to public highway does not deprive landowner of right of condemnation under this statute where alternative private right of way was not permanent and terminable at will of the grantors, was not an easement but merely a privilege, had been interfered with in the past and would be in the future and thus was not a reasonably adequate means of access. *Starnes v. Diversified Operations, Inc.*, 47 Ala. App. 270, 253 So. 2d 330 (1971).

Landlocked landowners did not have a reasonably adequate means of access over intervening lands to a public road and, therefore, were entitled to relief under this section. *McGowin Inv. Co. v. Johnstone*, 54 Ala. App. 194, 306 So. 2d 286 (1974).

Where route of access which plaintiff might have over his brothers' property could be cut off at any time, because both plaintiffs' property and that of his brother came from a common grantor, plaintiff was authorized to bring a private condemnation action so as to gain access to the nearest public road. *Crabtree v. Tew*, 485 So. 2d 726 (Ala. Civ. App. 1985).

Cited in *Romano v. Thrower*, 261 Ala. 361, 74 So. 2d 235 (1954); *Cotton v. May*, 293 Ala. 212, 301 So. 2d 168 (1974); *Bull v. Salsman*, 435 So. 2d 27 (Ala. 1983); *Stiefelmeyer v. Stiefelmeyer*, 485 So. 2d 729 (Ala. Civ. App. 1986).

§ 18-3-2. Right-of-way; restrictions; damages.

In the establishment and condemnation of such right-of-way, no road or right-of-way shall be established through any person's yard, garden, orchard, stable lot, stable, gin house or curtilage without the consent of the owner; and the applicant must pay the owner for the value of the land taken and

compensation for damage to the land, through which said right-of-way is established, resulting from the establishment of such road or right-of-way.

Howell: Practice Forms. — § 3-13-1.

CASE NOTES

General comment.
Damages.
Cited.

proprietor. *Brothers v. Holloway*, 692 So. 2d 845 (Ala. Civ. App. 1997).

Damages.

General comment.

Where an applicant acquires a right of way of necessity, he must pay the owner for the value of the land taken. *Bull v. Salsman*, 435 So. 2d 27 (Ala. 1983).

'Injury' within the formula for calculation of damages under this section means the loss of value suffered by the portion of the property not taken in the condemnation proceeding. *Brothers v. Holloway*, 692 So. 2d 845 (Ala. Civ. App. 1997).

This section, which was first enacted in 1919, codifies the rule of the common law affording just compensation which includes not only the value of the land which may be taken, but the injury resulting to the remaining lands of the

Cited in *Romano v. Thrower*, 261 Ala. 361, 74 So. 2d 235 (1954); *Southern Ry. v. Hall*, 267 Ala. 143, 100 So. 2d 722 (1957); *Gowan v. Crawford*, 599 So. 2d 619 (Ala. 1992).

§ 18-3-3. Right-of-way; application.

The right conferred by this article shall be exercised by application to the probate court of the county in which the lands over which such right-of-way is desired, or a material portion thereof are situated, and the same proceedings shall be had as in cases of condemnation of lands for public uses as provided by Chapter 1 of this title.

Evans: Property Rights. — § 40.12(b), nn. 279, 280. **Howell: Practice Forms.** — § 3-13-1.

CASE NOTES

Requirements.
Cited.

Grant of easement of necessity would not be affirmed where there was no proof of prior unity of ownership of the two parcels, as required at common law, and where applicant did not comply with statutory requirement of bringing action in the probate court. *Bull v. Salsman*, 435 So. 2d 27 (Ala. 1983).

Requirements.

The requirement of original unity of ownership to grant a common law easement of necessity has been qualified by statutory provisions which allow the owner to acquire a right of way if his land is not adjacent to any public road, the procedure being the same as in cases of condemnation of lands for public uses. *Bull v. Salsman*, 435 So. 2d 27 (Ala. 1983).

Cited in *Romano v. Thrower*, 261 Ala. 361, 74 So. 2d 235 (1954); *Southern Ry. v. Hall*, 267 Ala. 143, 100 So. 2d 722 (1957); *Gowan v. Crawford*, 599 So. 2d 619 (Ala. 1992).

ARTICLE 2

RIGHT-OF-WAY TO CERTAIN CEMETERIES OR GRAVEYARDS

§ 18-3-20. Right-of-way; cemeteries.

Where a cemetery or graveyard has been used by the public as a place for burying the dead for 20 years or more and no part of said cemetery or

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Cross reference 3-20.

§ 18-3-21. Ri

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§ 18-3-22. Pr

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Cross reference: § 11-49A-8.

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ublic as a place for
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graveyard is adjacent or contiguous to any public road or highway, any person who has, or any persons who have, relatives or relations buried in said cemetery or graveyard shall have the right to acquire and may acquire a convenient right-of-way, not exceeding in width 15 feet, over the lands intervening and lying between such cemetery or graveyard or body of land on which the same is situated and the public road or highway nearest or most convenient thereto.

Cross references. — Eminent domain, § 18-3-20.

§ 18-3-21. Right-of-way; restrictions; damages.

In the establishment and condemnation of such right-of-way, no road or right-of-way shall be established through any person's yard, garden, orchard, stable lot, stable, gin house or curtilage without the consent of the owner; and the applicant must pay the owner for the value of the land taken and compensation for damage to the land, through which said right-of-way is established, resulting from the establishment of such road or right-of-way.

§ 18-3-22. Probate court; application — Procedure.

The right conferred by this article shall be exercised by application to the probate court of the county in which the lands over which such right-of-way is desired, or a material portion thereof are situated, and the same proceedings shall be had as in cases of condemnation of lands for public uses as provided by Chapter 1A of this title.

Cross references. — This law is referred to in: § 11-49A-8.