WILSON *v.* RAMBO.

Opinion delivered October 28, 1929.

1. HIGHWAYS—CHANGES IN ROUTE OF ROAD IMPROVEMENT.—Under the Alexander Road Law (Acts 1915, c. 338), changes in the route of a road to be improved must be consistent with the original improvement plans.
2. HIGHWAYS—AUTHORITY TO CHANGE ROUTE.—Where a contract for construction of a highway was made on a yardage basis and before Acts 1927, c. 11, the right to change the route, as provided by Acts 1915, c. 338, was not affected by the fact that the improvement had been completed along that part of the road which was proposed to be changed, as the construction of part of the road did not terminate the contract so far as that part was concerned.
3. HIGHWAYS—MATERIALITY OF CHANGE IN ROUTE.—Where a proposed road improvement traversed the entire county, changes in the improvement which would eliminate two right angles in a city and shorten the distance four or five hundred feet were not material, and were within the power of the road improvement commissioners under the Alexander Road Law (Acts 1915, c. 338).

Appeal from Polk Chancery Court; *C. E. Johnson,* Chancellor; reversed.

STATEMENT OF FACTS.

Appellee brought this suit against appellants to enjoin them from changing a part of the route of the public road to be improved by the commissioners of Road Improvement District No. 1 of Polk County, Arkansas. The suit was defended on the ground that the commissioners had a right to change the road in the respect complained of.

Road Improvement District No. 1 of Polk County, Arkansas, was created by the county court of that county in March, 1919, under the provisions of act 338 of the Acts of 1915, commonly known as the Alexander Road Law. The road to be improved by the commissioners of the district was described as beginning at the south line of section 19, township 1 south, range 30 west, which is in the northern part of Polk County, and extending down through Mena and on south to the Sevier County line. Thus it will be seen that the improved road runs from the north to the south part of Polk County and is paral-

lel for the most part with the Kansas City Southern Railroad. The commissioners entered into a contract with a construction company to improve the road, and agreed to pay them on a yardage basis. A greater part of the improved highway had been completed by the original contractors when, by agreement, they abandoned the contract, and a new contract on a yardage basis was entered into with another firm of contractors, in 1922. The commissioners had completed the road for a distance of four miles or more north of the city of Mena, and for the most part south of that city.

The improved highway ran through the city of Mena, along Eagle Gap Avenue, and then turned north through Peach Tree Street for about two blocks, and then turned due east. Thus there were two right-angle turns in the highway in the city of Mena. This part of the road was improved under the contract. The commissioners at that time, however, contemplated making a change in the route in the city of Mena, provided they had money enough to do so after the rest of the road had been completed. They found that they had about $11,000 left, and they applied to the county court for an order to change the route of the road in the city of Mena so as to avoid the two right-angle turns, and make the route straight through the city. The judgment of the county court was secured in laying out the proposed change as a public road, and the city council of Mena also passed an ordinance laying out the proposed route as a public street in the city. The city ordinance was passed on the second day of April, 1929, and the order of the county court was made some time in 1928. The highway in question is also a part of the State Highway system. The district engineer of the State Highway Commission approved the changed route, and the evidence shows that the proposed change will eliminate two dangerous curves in the highway, and will shorten the distance about 500 feet. The right-of-way along the proposed change of route has already been secured at a cost of $1,000, and the road

improvement district commissioners have sufficient funds on hand to construct the proposed change in conformity with the original plans of the district.

Appellee operates a filling station at the end of Eagle Gap Avenue, which is about 600 feet from the point where they propose to begin the change in the road. The proposed change would greatly depreciate the value of her property.

On the part of appellants it was shown that the road through Eagle Gap Avenue is too narrow, and that, after taking out sidewalks and necessary drainage ditches, the roadbed would be only eighteen feet wide. The proposed change in the route will be eighty feet in width.

The chancellor found the issues in favor of appellee, and to reverse the decree in her favor appellants have prosecuted this appeal.

Alley & Olney, for appellant.

Minor Pipkin and *Duke Frederick,* for appellee.

HART, C. J., (after stating the facts). It is sought to uphold the decree upon the authority of *Taylor* v. *Rogers,* 176 Ark. 156, 2 S. W. (2d) 56. In that case it was held that all contracts made by road improvement district commissioners for the construction of bridges on the main line of the road involved, and which formed a part of the State Highway system, made subsequent to the passage of act 11 of the Acts of 1927, were made without authority, and are void. It was further held that all contracts, made either prior or subsequent to the passage of the Acts of 1927 relating to improvements of roads not a part of the State Highway system, are valid and binding if made in compliance with the law authorizing the same.

The improved highway was organized under the provisions of the act of 1915 commonly called the Alexander Road Law, and under the terms of that act commissioners are authorized to make changes in the character and route of the road to be improved. This court, however, has uniformly held that such changes in the character of

the improvement and the route of the road must be confined to those which are consistent with the original plans, and that material changes in the plans or route of the road cannot be made. *Rayder* v. *Warrick,* 133 Ark. 491, 202 S. W. 831; *Hunt* v. *Harvey,* 135 Ark. 102, 204 S. W. 600; *Nunes* v. *Coyle,* 148 Ark. 365, 230 S. W. 11; *Matlock* v. *Jones,* 171 Ark. 45, 284 S. W. 30.

It is first earnestly insisted by counsel for appellee that the contract had been completed, in so far as the proposed change in the route is concerned, and that the commissioners had no authority to make a new contract for the proposed change after the passage of the acts relating to the subject by the Legislature of 1927. We do not agree with counsel in this contention. The original contract was made on a yardage basis, and was an entirety. It contemplated that the whole of the proposed improved road should be constructed before the contract was at an end. The contract was on a yardage basis, and did not contemplate that the construction of any part of the road should terminate the contract in so far as that part was concerned. As we have already seen, it was in the power of the commissioners to make changes in the route of the road under the Alexander act, under which the district was organized; and the contract for the construction of the road was executed in contemplation of this provision of the statute. The construction contract was made on a yardage basis, and applied to changes in the route of the improved highway as well as to that part of the highway which was already laid out and established. The fact that the change was made after the improvement had been made along that part of the road did not affect the power of the commissioners to make the change; and, inasmuch as the commissioners had the power to make the change, it was the duty of the contractors to construct the proposed change or changes in accordance with the plans of the commissioners. The contract was made before the Acts of 1927 were passed, and, under the case cited above, the commissioners had a right to enforce the original contract.

We are of the opinion that, under the terms of the original contract, the commissioners were bound to construct the improved road along the proposed change, provided they had the power to make the proposed change, under the authority of the county court. The record shows that the proposed change was sanctioned by the county court, and that it was ordered to be made a part of the proposed public highway. The city of Mena also passed an ordinance laying out the proposed route as a city street.

As we have already seen, the act under which the district was created gave the commissioners the power to alter the route, provided the change was not a material one. In other words, any change, in order to be made, must not be a material change in the route, but must be a minor change which tends to perfect the general plan of the proposed road. The proposed road runs from the north part of Polk County through the city of Mena to the south boundary of the county, where it touches Sevier County. When we consider the length of the road as running through the entire county from north to south, and the fact that the proposed change made shorter the road four or five hundred feet, and that it eliminated two right-angle curves in the city of Mena, we do not think that it can be classed as a material change in the route. On the other hand, we think that it is a minor change which tends to conform to the original plans of the road and make it more perfect, and safer for the public travel.

The result of our views is that the proposed change is a valid one, and the chancellor erred in not so holding. It follows that the decree must be reversed, and the cause will be remanded with directions to the chancery court to dissolve the injunction, and to dismiss the complaint for want of equity. It is so ordered.