erty for the new right of way, which deflects almost five miles from the existing road bed.

[1] The act in question confers on the railroad companies the right "to straighten, widen, deepen, enlarge and otherwise improve the whole or portions of their lines of railroads, * * * whenever, in the opinion of the board of directors of any such company, the same may be necessary for the better securing the safety of persons and property, and increasing the facilities and capacity for the transportation of traffic thereon, and for such purposes to purchase, hold and use, or enter upon, take and appropriate land and material." Section 1 (Pa. St. 1920, § 18468). It cannot be denied that the new route will straighten the existing line for through traffic, and will also better secure the safety of persons and property, and increase the facilities and capacity for transportation of traffic on this portion of defendant's lines.

It is contended, however, that the power to straighten contemplates merely the construction of new tracks in close proximity to old ones, and only for the purpose of eliminating sharp curves, etc., and that to permit a deviation from the old line for a distance of nearly 5 miles, is practically to construct a new line, which was not contemplated by the act of 1869. The language of the act does not warrant such narrow construction. It was passed to enable railroads to make such changes in their road bed as the increase of traffic and the growth of communities might reasonably require. To straighten implies departure from the original line, the extent of which must necessarily depend on the necessities created by local conditions. A mere widening of the existing road bed through the city of Reading would not eliminate the main objectionable features, but, on the contrary, would increase the dangers incident to the grade crossing, and circumvent one of the purposes of the act, which is to better secure the safety of persons and property of those having occasion to cross defendant's railroad. Bigler v. Penna. Canal Co., 177 Pa. 28, 34, 35 A. 112. In Scranton Gas & Water Company v. D., L. & W. R. R., 225 Pa. 152, 73 A. 1097, an appropriation of land for the purpose of straightening the road over a route 4 miles in length and where there was a departure of half a mile from the original road bed, was held proper. While it must be conceded a railroad may not construct a new line under the guise of straightening the old one, the good faith and purpose of defendant are not questioned here, nor is it disputed that the route chosen is a proper one from an engineering standpoint.

[2] The special act incorporating defendant company, as well as the general railroad acts of February 19, 1849 (P. L. 79), and April 4, 1868 (P. L. 62), both contain the limitation on defendant's power of eminent domain that it shall not, in constructing its road, pass through any burying ground, place of public worship, or dwelling house without the consent of the owner.

The act of 1869 does not contain the exception found in the earlier acts, and it has accordingly been held that a railroad may, for the purpose of widening or straightening its road under that act, comdemn a dwelling house in the occupancy of the owner. Dryden v. Pittsburg, Virginia & Charleston Railway, 208 Pa. 316, 57 A. 710; Snyder v. B. & O. R. R., 210 Pa. 500, 60 A. 151; Bierly v. Phila. & Erie R. R., 225 Pa. 182, 74 A. 27; Norris v. Pittsburgh, B. & L. E. R. R., 278 Pa. 549, 123 A. 483. We deem unnecessary consideration to what extent land impressed with an earlier public use may be condemned under eminent domain proceedings, inasmuch as plaintiff is a private corporation with full power to sell or otherwise dispose of any part of its property, not already conveyed for burial purposes, especially as it appears the land appropriated for the right of way in question has not at the present time been devoted to such purposes, nor does its appropriation interfere with the use of the remainder of the cemetery property for the purpose intended. Plaintiff consequently stands in the same position as any other private owner of property. Scranton Gas & Water Co. v. D., L. & W. R. R. Co., 225 Pa. 152, 163, 73 A. 1097.

The decree of the court below is affirmed, at appellant's costs.

(288 Pa. 571)

COMMONWEALTH v. EASTERN PAVING CO.

(Supreme Court of Pennsylvania. March 14, 1927.)

1. Highways ⟸113(3)—Clause for conclusive arbitration in contract with department of highways was valid and prevented contractor from presenting claim to auditor and treasurer (Act March 30, 1811 [P. L. 145]).

Arbitration clause in contract between paving contractor and department of highways providing for arbitration of any dispute by state highway commissioner and the Attorney General or Deputy Attorney General of the commonwealth, whose decision should be conclusive, was valid, and contractor could not properly present his claim, without preliminary arbitration, to auditor general and state treasurer under Act March 30, 1811 (P. L. 145), providing for adjustment of claims of ordinary creditors against the commonwealth.

2. Highways ⟸113(3)—Validity of arbitration clause in paving contract with department of highways is not affected by designation of commissioner as arbitrator.

Effect of arbitration clause in paving contract with department of highways is not al-

tered by contract's designation of highway commissioner as arbitrator, unless such officer arbitrarily refuses to act or does so capriciously or fraudulently.

3. Highways ⇐113(3)—Paving contractor affirming contract by suit thereon could not impeach arbitration clause not claimed fraudulent or erroneous.

Paving contractor affirmed contract with department of highways by bringing action thereon, and could not impeach a clause therein providing for conclusive arbitration, where he did not claim the provision was inserted through fraud, accident, or mistake.

4. Highways ⇐113(3)—Arbitration clause in paving contract was not void for want of power, its insertion being within implied authority of commissioner (Act May 31, 1911 [P. L. 468]).

Conclusive arbitration clause in paving contract was not void, the insertion of such clause for protection of commonwealth being within implied authority of commissioner of highways under Act May 31, 1911 (P. L. 468), and other pertinent acts providing for establishment of state highway department and committing to commissioner duty of constructing and maintaining highways.

5. Highways ⇐113(3)—Paving contract with state may include clauses deemed essential and not positively forbidden.

Any clause deemed essential, including arbitration clause, may be incorporated in a paving contract between state and private contractor, unless restrained by positive enactment.

6. Highways ⇐113(4)—Paving contractor cannot disregard arbitration clause and present claim to auditor and treasurer as ordinary creditor (Act March 30, 1811 [P. L. 145]).

Act March 30, 1811 (P. L. 145), permitting adjustment by auditor general and state treasurer of ordinary claims against state and review on appeal, does not authorize paving contractor to present claim to those officers in disregard of express provision in contract for arbitration, where it is not alleged that commissioner capriciously or improperly refused to certify claim.

7. Highways ⇐113(4)—Paving contractor for department of highways must obtain compensation in manner provided by statute (Act May 31, 1911 [P. L. 463]).

Paving contractor for department of highways must secure compensation in manner provided by Act May 31, 1911 (P. L. 468), providing for certificate by commissioner to auditor general of balance due, and issuance of warrants by state treasurer upon appropriated funds.

Appeal from Court of Common Pleas, Dauphin County; Frank B. Wickersham, Judge.

Application to the Auditor General and State Treasurer by the Eastern Paving Company for allowance of its claim for balance due on contract. The claim was disallowed, and claimant appealed to the Court of Common Pleas. From an order of dismissal, claimant appeals. Affirmed.

Argued before MOSCHZISKER, C. J., and FRAZER, WALLING, SIMPSON, KEPHART, SADLER, and SCHAFFER, JJ.

W. B. Saul (of Saul, Ewing, Remick & Saul) of Philadelphia, and Beidleman & Hull, of Harrisburg, for appellants.

James O. Campbell, First Dep. Atty. Gen., and George W. Woodruff, Atty. Gen., for the Commonwealth.

SADLER, J. The Eastern Paving Company entered into a written contract with the department of highways to construct a road in Luzerne county. To prevent misunderstanding in carrying out the plans and specifications, the engineer in charge was granted the right to decide all questions that might arise as to the quality and acceptability of materials furnished and the work performed, and also any disputes as to the proper fulfillment of the contract. His decision was made a condition precedent to the allowance of sums which should from time to time be payable. Another provision, voluntarily agreed to by the builder, provided:

"In case any question or dispute arises between the parties hereto respecting any matter pertaining to this contract, or any part thereof, said questions or disputes shall be referred to the state highway commissioner and Attorney General or First Deputy Attorney General of the commonwealth of Pennsylvania, whose decision shall be final, binding and conclusive on all parties without exception or appeal; and all right or rights for any action at law or in equity under and by virtue of the contract, and all matters in connection with it and relative thereto, are hereby expressly waived by the contractor."

The work agreed upon was undertaken, and payments made from time to time. Ultimately a semifinal estimate was made, and a part of the amount so found to be due was turned over to the contractor, but a portion was retained by the commonwealth because of the alleged failure to conform to the specifications, in that there had been a neglect in certain designated areas to furnish and lay a concrete base of the depth and thickness required. The company was called upon to remedy the defects, but failed to do so. No attempt was made on its part to have the dispute arbitrated as provided in the contract, but it made demand directly on the auditor general and state treasurer for the balance of $28,000, the portion of the semifinal estimate remaining unsatisfied, before referred to, claiming under the act of 1811 (Act March 30 [P. L. 145]). The highway department objected, calling attention to the failure to arbitrate, and its contention was sustained. An appeal was then taken to the common pleas of Dauphin county. A motion

to dismiss it was later filed, and a rule granted to show cause why this should not be done. The parties entered into an agreement as to the facts involved, which was filed of record. Later, the learned court below dismissed the proceeding, and from its order this appeal was taken.

[1, 2] The claim of the parties has been most ably presented in the briefs submitted, and the contention narrowed to the question whether an arbitration clause in a contract as here involved is of any validity, and will prevent plaintiff from applying directly to the officers named in the act of 1811 for the adjustment of its demand. It is conceded that such a clause would be binding as between individuals or contractors with municipal corporations, or even with the United States government. U. S. v. Mason & Hanger Co., 260 U. S. 323, 43 S. Ct. 128, 67 L. Ed. 286; Goltra v. Weeks, 271 U. S. 536, 46 S. Ct. 613, 70 L. Ed. 1074. This admission makes unnecessary discussion of the many decisions where municipalities are involved, and the arbitration clause in the contract entered into enforced, but they are numerous and uniform in upholding the provision. And the fact that an officer of the contracting party is agreed upon as the decider of the dispute, in manner similar to the present case, does not alter the rule, unless it be shown that he arbitrarily refuses to act, or does so capriciously, or fraudulently. Reference to the following adjudications will suffice: Curran v. Philadelphia, 264 Pa. 111, 107 A. 636; Clark & Sons v. Pittsburgh, 217 Pa. 46, 66 A. 154; Drhew v. Altoona, 121 Pa. 401, 15 A. 636; Werneberg v. Pittsburg, 210 Pa. 267, 59 A. 1000; Com. v. Pittsburg, 204 Pa. 219, 53 A. 769; Hallock v. Lebanon City, 224 Pa. 359, 73 A. 333. These propositions are not contested by appellant, but it is insisted there was no power to insert such a clause in the agreement, and, though assented to by the contractor in order to secure the work, he is at liberty to disregard the stipulation, and present his demand as he sees fit.

[3-5] It will first be noticed that the balance here claimed is based upon a contract, and the action is in affirmance of it. The agreement assented to cannot now be impeached. Plaintiff knew what was included in the writing, and there is no suggestion of any fraud in its insertion, or that it was included through accident or mistake. Faunce v. Burke & Gonder, 16 Pa. 469, 55 Am. Dec. 519. The argument is made, however, that, though the terms were well understood, the arbitration clause is void, and therefore ineffective. There is no express legislative enactment that such provisions shall be inserted in highway contracts, though they have been used from the first of the road—building agreements. An examination of the pertinent acts, beginning with the Sproul Act of 1911 (May 31, P. L. 468), indicates an implied authority on the part of the commissioner of highways to so provide, in that there is committed to that officer the duty of constructing, maintaining, and improving the several highways, according to specifications "as regards the character, construction and material to be used," and the work of construction and maintenance must be done under the direction of that department. There the specifications are prepared, upon which bids are based and contracts awarded, necessarily with provisions protecting the interests of the commonwealth. When contracts are let, the contractor knows the terms by which he will be bound, and any clause deemed essential, relative to the work in hand, may be incorporated, and an arbitration clause is certainly within reason, and is usually found where municipal work is to be done, so as to avoid possible litigation. Unless restrained by some positive enactment, the stipulation for arbitration was promptly included in its agreement. Smith v. Wilkinsburg Borough, 172 Pa. 122, 33 A. 371.

[6, 7] But it is urged that the contractor is not necessarily bound by it in the case of state agreements, since the act of 1811 also provided a manner of adjusting indebtedness. That legislation was enacted for the benefit of creditors, who, theretofore, had no manner of enforcing a just demand against the sovereign, and permitted an adjustment and approval of a claim by the auditor general and state treasurer, whose action was subject to review on appeal. They were not bound to approve any demand presented, but to use their judicial discretion in passing on its validity. Here, they refused allowance because it appeared on the face of the record that the terms of the contract as to arbitration had not been complied with. It will be kept in mind also that the highway act of 1911 provided a different system for the auditing of claims arising from road contracts. Provision is there made for a determination by the highway department of balances due, which are not to be passed upon by the auditor general until certified by the commissioner, and, if then approved, are made payable by warrants drawn on the state treasurer from specific funds appropriated for road construction. The contractor presumably knew the law, and that any compensation to which it was entitled must be secured in the manner provided.

We are convinced that the arbitration clause in the contract was properly incorporated, and the contractor bound by it. Without complying with the agreement it has no right to have its claim for a balance awarded as that of an ordinary creditor under the terms of the act of 1811. If any capricious conduct on the part of the arbitrators had been set up, or if it appeared that there was admittedly an unsatisfied balance due which the commissioner improperly refused to certify to the auditor general under the act of 1911, a different situation would

be presented, and appropriate relief could be had. But it cannot demand as a creditor an approval of its bill under the act of 1811, where the contract upon which the demand is based shows a requirement for a preliminary arbitration, which admittedly was not complied with. The proceeding was therefore properly dismissed.

The order appealed from is affirmed, at the costs of appellant.

(288 Pa. 577)

COMMONWEALTH v. UNION PAVING CO.

(Supreme Court of Pennsylvania. March 14, 1927.)

1. Highways ⇐113(3)—Clause for conclusive arbitration in contracts with department of highways was valid, and prevented contractor from presenting claim to auditor and treasurer. (Act March 30, 1811 [P. L. 145]).

Arbitration clause in contracts between paving contractor and department of highways, providing for arbitration of any dispute by state highway commissioner and the Attorney General or Deputy Attorney General of the commonwealth, whose decision should be conclusive, was valid, and contractor could not present his claim to auditor general and state treasurer under Act March 30, 1811 (P. L. 145), providing for adjustment of claims of ordinary creditors against the commonwealth.

2. Highways ⇐113(4)—Conclusive arbitration clause in paving contract with department of highways prevented further action by claimant after adverse decision of arbitrators.

Clause in paving contract with department of highways providing for conclusive arbitration of dispute precluded further action after decision adverse to claimant contractor.

Appeal from Court of Common Pleas, Dauphin County; Frank B. Wickersham, Judge.

Application to the Auditor General and State Treasurer by the Union Paving Company for allowance of claims under three contracts, after disallowance by arbitrators designated by contracts. The demand was denied, and claimant appealed to the court of common pleas. From an order of dismissal, claimant appeals. Affirmed.

Argued before MOSCHZISKER, C. J., and FRAZER, WALLING, SIMPSON, KEPHART, SADLER, and SCHAFFER, JJ.

Walter Biddle Saul (of Saul, Ewing, Remick & Saul), of Philadelphia, and Beidleman & Hull, of Harrisburg, for appellant.

James O. Campbell, First Dep. Atty. Gen., and George W. Woodruff, Atty. Gen., for the Commonwealth.

SADLER, J. The Union Paving Company entered into three contracts with the highway department for the construction of certain roads in Lebanon county. These agreements provided the work should be done under the supervision of an engineer, whose decision should be binding, though in case of dispute the matter might be submitted to the commissioner and Attorney General, or his deputy, as arbitrators, whose decision should be conclusive. A demand was made upon the contractor that wooden runners be constructed during the course of the work so as to protect the bituminous surface while being laid. The builder protested against this requirement, and further claimed the highway department had failed to properly prepare the stone base. Compensation to the amount of $6,188.73 for the additional outlay necessitated was asked. This demand was refused, and the arbitrators to whom the case was submitted decided adversely to the claimant, to whom due notice of the decision was given.

Later, a claim was presented by the paving company to the auditor general and state treasurer, the right being claimed under the provisions of the Act of 1811 (Act March 30 [P. L. 145]). Allowance was denied, and an appeal taken to the court of common pleas of Dauphin county. This was later dismissed on motion, and from the order entered this appeal was taken.

[1, 2] The question here raised is as to the validity of the incorporation of arbitration clauses in road contracts, which we have held proper in Commonwealth v. Eastern Paving Co., 136 A. 853, in an opinion this day filed, and what is there said need not be repeated. The only difference in the two cases is that in the former the demand was not submitted to arbitrators, which in this it was, with the result that it was disallowed, decided adversely to claimant. If the arbitration clause was effective, then the decision of the arbitrators precluded further action by the appellant, and we so held.

The order appealed from is affirmed at the cost of appellant.

(289 Pa. 13)

TREXLER LUMBER CO. v. ALLEMANNIA FIRE INS. CO. OF PITTSBURGH.

(Supreme Court of Pennsylvania. March 14, 1927.)

1. Insurance ⇐668(10)—Whether damage to insured's building was caused by windstorm within meaning of policy held for jury.

In suit on windstorm policy, whether damage to plaintiff's buildings and lumber yard was caused by windstorm within meaning of policy or a snowstorm *held* for jury.

2. Appeal and error ⇐930(1)—Supreme Court will assume truth of plaintiff's evidence in passing on its sufficiency to support verdict.

In passing on the sufficiency of evidence to support a verdict for plaintiff, the Supreme Court will assume the truth of plaintiff's evi-