

[HIGH COURT OF AUSTRALIA.]

HARRISON APPELLANT;
 PLAINTIFF,

AND

THE DARLING TO GLEN WAVERLEY }
 RAILWAY CONSTRUCTION TRUST } RESPONDENT.
 DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
 VICTORIA.

H. C. OF A. *Railway Construction—Construction District—Construction Trust—Railway construction and betterment rates—Constitution of Railway Construction District—Line authorized to commence “at or near” specified point—“Subject to . . . modifications . . . considered desirable”—Compliance with requirements—Darling to Glen Waverley Railway Construction Act 1926 (Vict.) (No. 3500), sec. 3 (1) (a), Schedule—Railway Lands Acquisition Act 1928 (Vict.) (No. 3760), secs. 4, 6, 7, 18.*
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 MELBOURNE,
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Starke, Dixon, *Rates—Construction and betterment rate—Imposition of rate—Rescission of rate—Evatt and Requisite majority for rescission not obtained—Imposition of new rate—Validity of new rate—Railway Lands Acquisition Act 1928 (Vict.) (No. 3760), secs. 33 (2), 43, 45.*
 McTiernan JJ.

The respondent Trust was constituted by Order in Council under provisions now contained in sec. 18 of the *Railway Lands Acquisition Act 1928*. Act No. 3500 authorized the Board of Land and Works, as the Constructing Authority, to construct a railway commencing on the Darling railway line “at or near its junction” with the Outer Circle railway “subject to such deviations and modifications as may be considered desirable by the Board.” The railway when constructed in fact commenced about 650 yards from the junction of the two existing lines.

Held, that whether the point of departure was or was not “near” the junction, there had been a permissible modification of the required nearness.

On 25th July 1932 the respondent Trust passed a resolution striking a construction rate on the net annual value of the whole of the ratable property in the railway rating area for the period 1st July 1932 to 30th June 1933. On 8th August 1932 the Trust passed a resolution purporting to rescind the resolution of 25th July. This resolution was not passed by the majority of the trustees required by sec. 33 (2) of the *Railway Lands Acquisition Act 1928*. At the same meeting on 8th August the Trust purported to strike another construction rate for the period from 1st July 1932 to 30th June 1933.

Held, that the resolution of 8th August 1932 purporting to rescind the resolution of 25th July not having been passed by the majority required by sec. 33 (2) of the *Railway Lands Acquisition Act 1928* was invalid, and was not saved by sec. 45 of that Act, because although the rate passed on 8th August was approved by the Governor in Council and was published in the *Government Gazette*, it was not published in a newspaper circulating in the District as required by that section.

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Decision of the Supreme Court of Victoria (*Gavan Duffy J.*) affirmed.

APPEAL from the Supreme Court of Victoria.

The plaintiff appellant, Harold Walter Harrison, brought an action in the Supreme Court of Victoria on behalf of himself and the East Malvern Ratepayers Association, against the Darling-Glen Waverley Railway Construction Trust. The statement of claim was, in substance, as follows :—

1. (a) The plaintiff is a member of an unincorporated body called the East Malvern Ratepayers Association and he and the other members of that association are ratepayers of the City of Malvern on whom the defendant Trust is seeking to levy rates under the circumstances hereinafter mentioned. (b) The plaintiff is suing in this action on behalf of himself and all other members of the association.

2. The defendant Trust is a body corporate constituted or purporting to be constituted under the provisions of the *Darling to Glen Waverley Railway Construction Act 1926* (No. 3500) and the *Railway Lands Acquisition Acts*.

3. (a) The *Darling to Glen Waverley Railway Construction Act 1926* authorized the construction by the Board of Land and Works of a line of railway within the meaning of the *Railway Lands Acquisition Acts* commencing on an existing line called the “Darling railway” at or near its junction with another existing line called the “Outer Circle railway” and terminating at Glen Waverley. (b) The Act

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further authorized the Board to make fit for traffic that portion of the Darling railway between the Darling railway station and the commencing point of the new line.

4. Purporting to act under the provisions of those Acts the Chief Engineer for Railway Construction or the Board of Land and Works (the Constructing Authority) prepared surveys, maps, plans, and descriptions leading to the formation or proclamation of a Railway Construction District under the *Railway Lands Acquisition Acts* in respect of the line authorized to be constructed.

5. In preparing the surveys, maps, plans and descriptions the Chief Engineer or the Constructing Authority wrongly or wrongfully and fraudulently treated as part of the new line authorized to be constructed that portion of the old Darling railway which was made fit for traffic (or a part thereof) and thereby caused to be included in the Railway Construction District the lands of the plaintiff and the other members of the East Malvern Ratepayers Association.

6. The defendant Trust was constituted as a Railway Construction Trust for and in respect of the Railway Construction District.

7. Neither the Railway Construction District nor the defendant Trust was legally constituted under the above-mentioned Acts or at all and the acts of the Trust hereinafter mentioned were illegal and *ultra vires* and were null and void and of no effect.

8. The defendant Trust has at various times made and levied or purported to make and levy Railway Construction rates including a rate purporting to have been made on 25th July 1932 on the lands of the plaintiff and of the other members of the Association, and has enforced or attempted to enforce and is threatening to enforce payment of such rates and will, if not restrained, continue to attempt so to enforce such payment.

9. The rates were not made or levied or demanded in conformity with the provisions of the above Acts, and the plaintiff will rely on the provisions of secs. 33, 43, 44, 45 and 46 of the *Railway Lands Acquisition Act* 1928.

The plaintiff claimed :—

(a) A declaration that the rates and each of them, made and levied or purporting to be made and levied by the defendant on the lands

of the plaintiff and of the members of the Association were illegal and null and void and unenforceable ;

(b) A declaration that the defendant Trust was not legally constituted and that its acts were null and void and unenforceable.

(c) An injunction or prohibition restraining the defendant from enforcing or attempting to enforce payment of the rates by the plaintiff and the members of the Association.

By its defence the defendant in substance admitted pars. 2, 3, 4, 6 of the statement of claim, and denied pars. 1, 5, 7 and 9 thereof. It admitted that on 8th August 1932 it made a railway construction rate on the lands of the plaintiff and all other ratable property within the Railway Construction District, and had enforced or attempted to enforce payment of such rate. Otherwise it did not admit any of the allegations contained in par. 8 of the statement of claim. The defendant also raised the defence that by virtue of sec. 50 of the *Railway Lands Acquisition Act* 1928 and sec. 343 of the *Local Government Act* 1928 any invalidity or badness of the rates referred to in par. 8 of the statement of claim did not avail to prevent the recovery of such rates by the defendant. It also alleged that the acts and matters complained of were acts and matters done by the defendant under and by virtue and in pursuance of the powers conferred upon it by the *Railway Lands Acquisition Acts* and the *Darling to Glen Waverley Railway Construction Act* 1926.

The substantial issues raised were first, that the construction of the new line did not commence at a point on the existing Darling railway line "at or near" its junction with the other existing railway line called the Outer Circle railway, and that the Railway Construction District was therefore not validly created, and this invalidated the constitution of the Trust, and of the rate imposed by the Trust.

The other point was that a resolution passed by the Trust on 8th August 1932 purporting to rescind a resolution of 25th July 1932 was not passed by a two-thirds majority as required by sec. 33 (2) of the *Railway Lands Acquisition Act* 1928, and that a rate purporting to have been passed on 8th August 1932 but not by a two-thirds majority of the trustees, being the rate sought to be enforced, was invalid.

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The action was heard by *Gavan Duffy J.* and the following statement of facts and law is extracted from his Honor's judgment:—

This is an action in which the plaintiff on behalf of himself and the East Malvern Ratepayers Association complains of a rate imposed by the defendant and asks for various forms of relief in respect of it. The *Darling to Glen Waverley Railway Construction Act 1926* No. (3500) authorized the Board of Land and Works (the Constructing Authority) to make and construct "A five feet three inches gauge railway commencing on the Darling railway at or near its junction with the Outer Circle railway in the parish of Prahran and terminating in or near allotment one hundred in the parish of Mulgrave all in the County of Bourke in the line and upon the lands described in the Schedule to this Act to be called the Darling to Glen Waverley railway; and . . . to do anything it deems necessary to make fit for traffic that portion of the Darling railway which is situate between the Darling railway station and the commencement of the line by this Act authorized to be made" (sec. 3).

The various steps between such an authorization and the striking of the rate here complained of are to be found in the *Railway Lands Acquisition Act 1928* and are summarized as follows:—(1) The Act authorizes the construction of the railway. (2) Chief Engineer for Railway Construction certifies to the Minister and the Constructing Authority the land appearing to be required to be taken or used temporarily. The certificate is to be accompanied by plans, maps, &c. as appear necessary and shall set forth the lands on and through which such authorized line is proposed to be constructed, and the names of the owners and lessees and occupiers (sec. 4 of the *Railway Lands Acquisition Act 1928*). (3) The Minister shall direct the Constructing Authority to proceed pursuant to the provisions of this Act in regard to Railway Construction Trusts (sec. 5 (2)). (4) Upon receiving the Chief Engineer's certificate with the maps, plans, &c., and upon being directed by the Minister to proceed the Constructing Authority shall cause plans and descriptions to be prepared of all lands which in its opinion will be materially enhanced in value by the construction of such authorized lines (sec. 6). (5) The Constructing Authority shall cause the plans, &c., which it has had made to be forwarded to the Minister with a certificate that the

lands therein ought to be proclaimed a Railway Construction District (sec. 7). (6) The Minister may if he thinks fit submit such plans, &c., and certificate to the Governor in Council (sec. 7). (7) The Governor in Council may by order published in the *Government Gazette* and in some paper circulating in the proposed district announce his intention to constitute such lands a Railway Construction District (sec. 8). (8) At any time after the expiration of one month but within twelve months from the date of such publication in the *Government Gazette* make a further order constituting such Railway Construction District (sec. 9 (1)). (9) The Governor in Council may by the order constituting such Railway Construction District or by any subsequent order constitute a Trust for such district (sec. 18). (10) A copy of the certificate of the Chief Engineer with the maps, plans &c., shall be forwarded by the Constructing Authority to the Trust and the Trust shall thereupon proceed to acquire the necessary land and make compensation (sec. 36). The Act further provided :—“ 42. (1) Any Trust may from time to time but not oftener than once in each year cause an estimate to be prepared of the money required . . . and such estimate shall show the total net annual value of the ratable property in the Railway Construction District of the Trust. (2) When such estimate has been prepared the Trust may from time to time make a rate to be called the Railway Construction Rate, with the name by which the line of railway has been authorized prefixed to the word “ Railway.” 43. (1) The rates so to be made and levied by any Trust shall be made and levied upon all the ratable property within its Railway Construction District and such rates shall vary in proportion to the advantage or benefits appearing to accrue to the lands therein by the construction of the line of railway. 44. Any Trust may divide the lands within its Railway Construction District into so many portions as the Trust thinks fit, and in making such division regard shall be had to the advantage or benefits to be derived from the authorized line of railway by the lands within the several portions so that such lands as in the opinion of such Trust will be equally benefited by the construction of the authorized line shall be placed in the same division. . . . 45. Any rate made and levied by a Trust under this Act may be made by a resolution

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of the Trust, and every such resolution shall be published once in the *Government Gazette* and once in some newspaper circulating in the Railway Construction District, and after such publication shall have the same force and effect in respect of that District as if enacted in this Act."

More than one rate was struck by the defendant, but Mr. *Hogan* on behalf of the plaintiff limited his complaint to that of 8th August 1932.

His objections fall under four heads :—

(1) The defendant Trust was not legally constituted and its act in purporting to strike a rate was null and void because :—(a) In preparing the surveys, maps, plans and descriptions required by the *Railway Lands Acquisition Act* 1928 the Chief Engineer and the Constructing Authority treated as part of the new line authorized to be constructed that part of the old Darling railway made fit for traffic which extends in a westerly direction from the junction of the "Darling railway" and the "Outer Circle railway" (as defined in *Darling to Glen Waverley Railway Construction Act* 1926) to a point approximately opposite Taylor Street, and thereby caused to be included in the said Railway Construction District the lands of the plaintiff and the other members of the said East Malvern Rate-payers Association. (b) The Trust was gazetted before the district in respect of which it was to be a trust. (2) In dividing the lands within the Railway Construction District under sec. 44 of the *Railway Lands Acquisition Act* 1928 the Trust made an unreasonable or improper division. (3) The rate was bad because :—(a) When the resolution which imposed it was passed there was still standing an earlier resolution imposing a rate in respect of the same period, the purported rescission of such earlier resolution being ineffective because of the provisions of sec. 33 (2). (b) There had not been the publication required by sec. 45. (4) The rate was irrecoverable because no proper notice has been given in accordance with sec. 49 (2).

Gavan Duffy J. held that it was not necessary for him to consider whether the actual starting point was "at or near" the junction of the Darling and Outer Circle railways ; but in view of the words

in the schedule of the Act "subject to such deviations and modifications as may be considered desirable by the Board" ("the Constructing Authority") he would, if necessary, have been prepared to hold that the actual starting point was within the Parliamentary authority.

On the other point his Honor said:—"The attack on the validity of the resolution imposing the rate arises in this way:—On 25th July the Trust passed a resolution 'that a Construction Rate as hereunder be struck on the net annual value of the whole of the ratable property in the railway rating area for the period July 1st, 1932 to June 30th, 1933 due and payable on July 30th, 1932.'

On 8th August the Trust passed a resolution 'that the resolution of the Trust of July 25th, 1932 making a Construction Rate varying from 1s. 10d. in the £ upon zone No. 1 to 1d. in the £ on zone No. 10' (this was the rate referred to above) 'be rescinded.' This resolution however, was not passed by the majority required by sec. 33 (2). The Trust then at the same meeting passed a resolution 'that a Construction Rate as hereunder be struck on the net annual value of the whole of the ratable property in the railway rating area for the period July 1st, 1932 to June 30th, 1933 due and payable on August 9th, 1932.' This is the rate now complained of."

As to this objection his Honor held that the resolution for the rate even if not further acted upon, while it stood was a bar to a second attempt to impose a rate for the same period, and, secondly, that though the approval of the Governor in Council was necessary under sec. 43 (1), the Trust had done its part when it had passed the resolution, and it would be contrary to both the letter and spirit of sec. 43 (2) to hold that the Trust was entitled to do what it purported to do on 8th August 1932. His Honor consequently declared (1) that the defendant, the Darling to Glen Waverley Railway Construction Trust was validly constituted; (2) that the Darling to Glen Waverley Railway Construction District was validly constituted, and (3) that the rate purporting to have been made by the resolution of the defendant on 8th August 1932 was illegal and unenforceable, and ordered the defendant to pay to the plaintiff the latter's costs, except the costs of the issues whether the defendant Trust was validly constituted and whether proper notice was given

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by the defendant Trust under sec. 49 of the *Railway Lands Acquisition Act* 1928, and ordered the plaintiff to pay to the defendant the costs of those issues.

The plaintiff appealed to the High Court against so much of this decision as was adverse to him, and the defendant cross-appealed.

Hogan, for the appellant. The Chief Engineer took a wrong commencing point. The commencing point should have been fixed much further east. A point some distance back along the old line should not have been taken as the commencing point of the new line, but it should have been as near as practicable to the junction of the old and new lines. The object of fixing such a starting point is for the purpose of imposing a tax to pay for the new line, that is, to pay for the cost of acquiring the land, not of building the line. A Railway Construction District cannot include both new line and part of the old rehabilitated line. If the whole foundation of the District failed, it cannot be made good although it was constituted by Order in Council. The Trust acted in relation to a portion of the line which was not authorized, and, therefore, the whole District is wrongly constituted. If the Trust wanted to impose the rates it would have to start *de novo*. Part of the complaint is that persons in the west of the District obtained no facilities from the new line, but were charged in the same manner as persons who were further to the east, and who actually obtained a benefit. If there is no basis for the formation of the District, there is no basis for the formation of the Trust and the imposition of the rate. The commencing point selected by the Chief Engineer and the Constructing Authority does not come within the meaning of the words "at or near" the junction of the Darling and the Outer Circle railway lines.

[DIXON J. referred to *Lucas v. Mooney* (1).]

The meaning of such a phrase depends on the surrounding circumstances. The rate of 8th August 1932, which it is sought to enforce, is bad, first, because the rate of 25th July 1932 was not rescinded by a two-thirds majority of the trustees as required by sec. 33 (2) of the *Railway Lands Acquisition Act* 1928, and, secondly, because so long as the earlier rate stood it barred any attempt to impose a second rate, even if the first rate was not acted upon.

(1) (1909) 9 C.L.R. 231.

Eager, for the respondent, was not called upon on the main appeal. On the cross-appeal. Having made an estimate under sec. 42 (1) of the *Railway Lands Acquisition Act* 1928, there is nothing to prevent the Trust making rates from time to time. There is no need to make a special estimate before making each rate. When an estimate is once made, rates may be levied upon it from time to time (*R. v. Inhabitants of Fordham* (1)). Sec. 42 (2) cannot be read as containing the provision in sec. 42 (1) that the "rate" must not be prepared more than once a year. The resolution of 25th July 1932, not having obtained the sanction of the Governor in Council, had no effect. The rate of 8th August was saved by sec. 45 of the *Railway Lands Acquisition Act* 1928. The rate may be advertised at any time before the commencement of legal proceedings to enforce it. Sec. 45 means that when the rate is published in the *Government Gazette* and advertised, it has the same effect as if made by the law making authority (*Montreal Street Railway Co. v. Normandin* (2) ; *Maxwell on The Interpretation of Statutes*, 7th ed. (1929), pp. 321 *et seq.*). The rate is not effective until approved by the Governor in Council (*Churchwardens, &c., of Potton v. Brown* (3)).

Hogan, in reply. The consent of the Governor in Council is a preliminary but not an essential requirement to the making of a rate. Either the consent of the Governor in Council was essential and it was not obtained, or, if it was not essential, such consent was an essential step in the making of the resolution, which could not be altered without a two-thirds majority of the trustees.

Eager, in reply on the cross-appeal. The rescinding of the July resolution and the passing of the August resolution were distinct acts. The latter resolution should be looked at by itself, and given whatever effect it may have.

Cur. adv. vult.

The following written judgments were delivered :—

STARKE J. This was an action in which a declaration was sought that the Darling to Glen Waverley Railway Construction Trust was not constituted in the manner required by the *Darling to Glen Waverley Railway Construction Act* 1926 (No. 3500), and the *Railway Lands Acquisition Act* 1928. The *Construction Act* authorized the

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(1) (1839) 11 Ad. & El. 73 ; 113 E.R. 341.

(2) (1917) A.C. 170, at p. 173.

(3) (1864) 10 L.T. 525.

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making of a railway commencing on the Darling railway at or near its junction with the Outer Circle railway subject to such deviations and modifications as might be considered desirable by the Board of Land and Works, and also the doing of anything the Board deemed necessary to make fit for traffic that portion of the Darling railway line which is situate between the Darling railway station and the commencement of the line authorized by the Act. The junction of the Darling and Outer Circle railway lines was at a point in a southeasterly direction from the Darling railway station. But the Darling and Glen Waverley line was not constructed so as to commence at this point; it was constructed a short distance north of it, crossed the Outer Circle line, and joined up with the Darling railway line nearer to the Darling railway station than the junction.

It was argued that this deviation from or modification of the commencing point of the line named in the Act was unauthorized, and that consequently the Railway Construction District and the Darling to Glen Waverley Railway Construction Trust were not formed in accordance with the provisions of the *Construction Act* and the *Railway Lands Acquisition Act*. The deviation or modification resulted in the shortening of the Glen Waverley line, and gave it advantages both in direction and in curves. The line as constructed commenced at a point on the Darling railway which was not far from the junction of the Darling and Outer Circle railway lines. And the authority to construct the line is not rigid: it is subject to such deviations and modifications as may be considered desirable by the Board, and the engineering advantages of the deviation or modification—if that be of any importance—are obvious upon the mere inspection of the plans. Consequently, in my opinion, the Darling to Glen Waverley line of railway, as it was constructed, is within the authority conferred by the *Construction Act*, and is authorized by it.

Objections to the inclusion of the lands of the plaintiff and other members of the East Malvern Ratepayers' Association within the Railway Construction District, based upon the unauthorized construction of the Darling to Glen Waverley line, necessarily fail, and so do objections to the constitution of the Railway Construction Trust based upon the same ground. It was therefore rightly declared

that the Darling to Glen Waverley Railway Construction Trust and the Darling to Glen Waverley Railway Construction District were validly constituted.

But it was also declared that a rate purporting to have been made by a resolution of the defendant on 8th August 1932 was illegal and unenforceable. On 25th July the Construction Trust passed a resolution that a construction rate as hereunder be struck on the net annual value of the whole of the ratable property in the railway rating area for the period 1st July 1932 to 30th June 1933 due and payable on 30th July 1932 : Zone 1, 1s. 6d. in the £ ; 2, 1s. 1d. ; 3, 11d. ; 4, 10d. ; 5, 8d. ; 6, 7d. ; 7, 6d. ; 8, 4d. ; 9, 3d. ; 10, 1d. The July rate was not approved by the Governor in Council, nor published in accordance with the *Railway Lands Acquisition Act* 1928 (see secs. 43, 45). By a resolution of 8th August 1932, the Trust purported to rescind the resolution of 25th July 1932. On the same date, 8th August, the Trust resolved “ that a construction rate as hereunder be struck on the net annual value of the whole of the ratable property in the railway rating area for the period July 1st 1932 to June 30th 1933 due and payable on August 9th 1932.” The rate so adopted was higher than that imposed on 25th July 1932. The validity of the August rate depends upon the provisions of several sections of the *Railway Lands Acquisition Act* 1928. The 33rd section, sub-sec. 2 provides : “ No resolution or other act of the trustees at any meeting shall be revoked or altered at any subsequent meeting unless such meeting is specially convened for the purpose nor unless such revocation or alteration is determined upon by a majority consisting of at least two-thirds of the trustees present at such subsequent meeting.” It is conceded that the August resolutions were not passed by a majority consisting of two-thirds of the trustees present at the meeting ; in fact they were passed by a majority of one. The rate was approved by the Governor in Council, and published once in the *Government Gazette*, but it has not been published once, or at all, in “ some newspaper circulating in the Railway Construction District.” The August resolutions contravene sec. 33 (2), and the provisions of sec. 45 cannot be relied upon to give them force and effect, owing to the absence of the publication required by that section. The declaration

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that the rate purporting to have been made by resolution on 8th August 1932 is illegal and unenforceable is therefore right.

The appeal and cross-appeal should be dismissed.

DIXON J. The respondent Railway Construction Trust was constituted by Order in Council under what is now sec. 18 of the *Railway Lands Acquisition Act* 1928 for the purposes of the railway line from Darling to Glen Waverley, the construction of which was authorized by Act No. 3500. That Act empowered the Board of Land and Works, as the Constructing Authority, to make and construct a railway commencing on the existing Darling railway at or near its junction with the existing Outer Circle railway in the line and upon the lands described in a schedule, and to do anything it deemed necessary to make fit for traffic that portion of the Darling railway which is situate between the Darling railway station and the commencement of the line so authorized. The schedule described the line to be constructed as commencing on the Darling railway at or near its junction with the Outer Circle railway, and proceeding thence for about five and three-quarter miles in an easterly direction terminating in or near a specified place, "subject to such deviations and modifications as may be considered desirable by the Board." The two existing railway lines, both of which at that point were disused, met at an acute angle to form which the Darling railway ran in a curve from its easterly course to the south. In the permanent survey of the new line, which did not discriminate between the work of making fit the old line for traffic and of constructing the new line, the point of departure from the course of the existing railway was shown some considerable distance west of the commencement of its southerly curve by which it met the Outer Circle line, and about six hundred and fifty yards from the point of junction. The certificate of the Chief Engineer for Railway Construction under sec. 4 of the *Railway Lands Acquisition Act* 1928 was based upon this plan, which the actual construction of the line followed. Under sec. 6, with this plan before it, the Constructing Authority caused plans and descriptions to be prepared of all lands, which, in its opinion, would be materially enhanced in value by the construction of the authorized line, and, under sec. 7, caused them to be forwarded to

the Minister together with a certificate that the lands shown thereon and described therein ought to be proclaimed a Railway Construction District, which was accordingly done. The respondent was constituted, under sec. 18, the Railway Construction Trust for such district.

The appellant is one of a number of persons whose lands have been included in the district, although they lie west of the actual point of junction of the two old railway lines. He brought in the Supreme Court the action out of which this appeal arises, seeking declarations of right and consequential relief to establish his freedom from liability to railway construction and betterment rates. The substance of his complaint is that the point of departure from the existing Darling railway line was not “at or near” its junction with the Outer Circle railway, with the consequence that, in forming its opinion under sec. 6 of the *Railway Lands Acquisition Act* 1928 of what lands would be materially enhanced in value by the construction of the authorized line, the Constructing Authority took into account a portion of railway which was not authorized, and so wrongly included lands of the appellant and others in the Railway Construction District, which, accordingly, was badly constituted.

The correctness of this contention depends primarily upon the assertion that the commencement of the railway, as constructed, does not comply with the requirement or description of Act No. 3500. That requirement is that it shall commence in the Darling railway at or near its junction with the Outer Circle railway, but the requirement is subject to such deviations and modifications as may be considered desirable by the Board. It is contended that the qualification expressed in these concluding words, which appear in the description in the schedule, does not apply to the fixing of the commencing point, but only to the route between the two termini. Neither grammar nor sense supports this interpretation of the description. The precise point at which the new construction should leave the old was essentially an engineering question, which the Legislature would not desire to foreclose, and the expressions “at or near” and “subject to . . . modifications” are well adapted to leave it open. No reason appears for denying the

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application of the phrase “ subject to such deviations and modifications as may be considered desirable by the Board ” to the whole description contained in the schedule, including that of the point of commencement. In any event, it is by no means clear that the point of departure from the old Darling line actually adopted is not “ near ” its junction with the Outer Circle line within the meaning of Act No. 3500. “ Near ” is not a word which can be applied without considering the object with which it is introduced into the description. That object was to enable the selection in the existing line, which, in order to make the old junction, swung away from the intended route of the new, of an appropriate point for commencing the new railway, but to limit the selection to the vicinity of the junction. A study of the old lay out does not demonstrate that the description “ near the junction ” is inappropriate to the actual point of departure. But whether it is accurate to call it “ near ” or not does not matter, because, if not, it is a permissible modification of the required nearness.

For these reasons the decision of *Gavan Duffy J.* appealed from should be affirmed.

But, in respect of a particular rate with which the respondent Railway Construction Trust has attempted to charge the appellant, the latter obtained from the learned Judge a declaration that it was illegal and unenforceable, and from that declaration the respondent has cross-appealed. The question raised by the cross-appeal turns upon sec. 33 of the *Railway Lands Acquisition Act 1928*, the two sub-sections of which are expressed as follows :—“(1) All questions at any meeting of the members of any such Trust shall be decided by a majority of the trustees present and in case of an equal division of votes the chairman at such meeting shall have a second or casting vote in addition to his vote as a trustee. (2) No resolution or other act of the trustees at any meeting shall be revoked or altered at any subsequent meeting unless such meeting is specially convened for the purpose nor unless such revocation or alteration is determined upon by a majority consisting of at least two thirds of the trustees present at such subsequent meeting.”

It appears that rival proposals for the striking of a rate at graduated amounts for different zones were before a meeting of the Trust on

25th July 1932. The meeting was equally divided and, upon the casting vote of the chairman, the lower rate was adopted. A resolution was passed that a construction rate as specified be struck on the net annual value of the whole of the ratable property in the railway rating area for the period 1st July 1932 to 30th June 1933. Sec. 45 provides that "Any rate made and levied by a Trust under this Act may be made by a resolution of the Trust, and every such resolution shall be published once in the *Government Gazette* and once in some newspaper circulating in the Railway Construction District and after such publication shall have the same force and effect in respect of that District as if enacted in this Act." Thus subject to the approval of the Governor in Council, which appears to be required by sec. 43 (2), the resolution passed would have been effective to impose the rate, upon its being published in the *Government Gazette* and in a newspaper. But, after the resolution had been passed and the resolution for the higher rate put, and rejected on the casting vote of the chairman, a member of the trust, who supported the higher rate, gave notice of motion for the rescission of the resolution just passed. To consider this motion a meeting was specially convened for 8th August 1932. At that meeting the motion was carried for the rescission of the resolution passed at the previous meeting, but not by a majority consisting of at least two-thirds of the trustees present as required by sec. 33 (2). Thereupon the higher rate previously rejected was adopted by a resolution passed by a majority of one. This resolution appears to have been approved by the Governor in Council. It was gazetted, but, before it was published in a newspaper, the appellant issued his writ. It, therefore, has not yet obtained the force given to it by sec. 45 and, if complete compliance with the conditions laid down by that section would give it a binding force, it ought not to be allowed to obtain it. For it appears clearly to have been passed in violation of sec. 33 (2). The resolution rescinding the previous resolution for a rate was an express revocation, which could not be passed except by a two-thirds majority and without that express revocation, the resolution for the higher rate would involve an implied revocation or alteration of the former resolution and would require the same majority. Sec. 50 incorporates sec. 343 of the *Local Government Act* 1928, which enacts that upon

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any complaint or action for the recovery of any rate from any person, the invalidity or badness of the rate as a whole or in respect of any part thereof shall not avail to prevent such recovery. But it does not incorporate sec. 302, which gives an appeal against a rate for any cause of grievance. This does not mean that the statute intends that an attempt to impose a rate, although by a procedure which violates the legislation, should be allowed to be made by a Railways Construction Trust without legal hindrance. Whether, if the procedure were brought to a final conclusion, sec. 45 and sec. 50 by incorporating sec. 343 (2) of the *Local Government Act* 1928, would operate to put the rate beyond question need not be considered (Cf. *The Minister of Health v. The King (On the Prosecution of Yaffe)* (1)). The possibility that a proceeding, which departs from the requirements of the law, may become no longer open to attack is no reason why the Court should not intervene before it is complete.

The decision of *Gavan Duffy J.* upon the validity of this particular resolution for a rate is right and the cross-appeal should be dismissed.

The order should be—Appeal dismissed with costs ; cross-appeal dismissed with costs. Costs to be set off.

EVATT J. In this case I concur in the judgment of my brother *Dixon*.

McTIERNAN J. I have read the judgment of my brother *Dixon* and agree with it.

Appeal dismissed with costs. Cross-appeal dismissed with costs. Costs to be set off.

Solicitor for the appellant, *J. Woolf*.

Solicitor for the respondent, *Ernest I. Thompson*.

H. D. W.