

The Mayor, Councillors and Citizens of the City of Auckland and
others - - - - - *Appellants*

v.

The Alliance Assurance Company, Limited - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 26TH JANUARY, 1937.

Present at the Hearing:

LORD ATKIN.

LORD THANKERTON.

LORD MACMILLAN.

LORD WRIGHT

(MASTER OF THE ROLLS).

LORD MAUGHAM.

[*Delivered by* LORD WRIGHT.]

The question to be determined in this appeal is what are the rights of the Alliance Assurance Company, Limited, the respondents, under a debenture bond for £100 and the coupons still outstanding under it of which they are bearers. The bond and coupons were issued by the Mayor, Councillors and Citizens of the City of Auckland in New Zealand, the defendants in the action and the appellants before this Board. The Auckland Transport Board who were third parties in the action are also appellants, but no question arises in this appeal as to their position.

The debenture bond is numbered 1744 and is for £100. It was issued under the common seal of the appellant corporation on the 9th February, 1920. It is headed: "Auckland City Council, Auckland, New Zealand. Auckland City Tramway Loan of £1,250,000. Secured on the revenues of the City of Auckland, subject to the existing loans chargeable on such revenues.", and is payable at the holder's option either in Auckland, New Zealand, or in London on the 1st July, 1940, and is expressed to be issued by the Auckland City Council, New Zealand, under the Local Bodies Loans Act, 1913, and section 26 of the Appropriation Act, 1915. It provides by its terms that:

"On presentation of this debenture either at the Bank of New Zealand, Auckland, New Zealand, or at the Bank of New Zealand, London, England (at the option of the holder hereof) on the first day of July, 1940, the bearer will be entitled to receive £100. Interest on this debenture will cease after the day when the

payment falls due unless default is made in payment. This debenture bears interest at the rate Five pounds five shillings per centum per annum payable on the first days of January and July in each year on presentation of the attached coupons."

The coupon now in suit is No. 33. It is headed: "Auckland City Tramway Loan, 1920. Of the City of Auckland, New Zealand, issued under The Local Bodies Loans Act, 1913, and section 26 of The Appropriation Act, 1915, secured on the revenues of the City of Auckland, subject to the existing Loans chargeable on such revenues." It contains the following provision: "On presentation of this coupon at the Bank of New Zealand, London, England, or Auckland, New Zealand, at the option of the holder for the time being on or after the first day of January, 1936, the bearer will be entitled to receive £2 12s. 6d.,"; it is signed by the Mayor and the City Treasurer. The series of debentures, of which No. 1744 forms one, was issued under the following circumstances. An English registered company had, some years before 1919, constructed a tramway system in the City of Auckland. In 1919 while they were operating the system they gave an option to the appellant corporation to purchase the tramway undertaking with all its assets. In consequence an agreement was entered into dated the 16th February, 1920, between the English tramway company and its mortgagees, an English investment company, on the one hand, and the appellant corporation on the other, for the sale of the whole of the tramway undertaking, its lands, its various rights and all its assets, for the total aggregate sum of £1,227,201 8s. 7d. The price was to be satisfied by a payment to the vendors of £1 8s. 7d. in cash, and by the issue to them of debentures for the total sum of £1,227,200. According to the agreement, the rate of interest on a certain proportion of these debentures was £5 per cent. per annum, and as to the balance £5 5s. per cent. per annum. The agreement provided that the debentures should rank *pari passu* and should be payable both as regards principal and interest at the option of the holder for the time being either in London or Auckland, and should be in denominations from £20 to £1,000, as required by the vendors. The consideration for the sale was arrived at on the basis of certain items which were set out in the agreement. Certain of these items were sums of sterling, in particular, the amount of the mortgage debt of the tramway undertaking which was £393,750, and the amount representing the net profits, subject to an allowance, of the tramway company for the year ending the 30th June, 1919. Other sums were presumably in New Zealand currency, such as the sum representing the liabilities of the tramway company existing at the date of the agreement. There was nothing expressed in the agreement to show in what currency the sum of £750,000, which was the major part of the consideration, was calculated. The transaction thus took the form of a sale by the vendors to the appellants as purchasers of the property for the sum above stated. This sum was satisfied by a cash payment of £1 8s. 7d. and by the issue of the

debentures. The transaction amounted in substance to a borrowing from the vendors by the purchasers of the balance of the purchase price, which took the form of the issue of the debentures.

The dispute which has now arisen is whether the respondents are entitled to be paid the principal and interest in sterling, that is, in the currency of England, on the assumption or basis of their having availed themselves of the option to be paid in London, or whether their right on that footing is merely to be paid in the currency of New Zealand, which in 1936 was considerably depreciated. The action, which was brought by the respondents, claimed a declaration that they were entitled to be paid in sterling, that is, in the currency of England, both as to principal and interest, and in particular claimed payment of 13s. 1d., as being the difference between £2 12s. 6d., the sum due under the coupon in question, and the sum of £1 19s. 5d., the sum tendered to them in respect of their coupon when, having exercised their option to be paid in London, they duly presented the coupon for payment at the Bank of New Zealand in London. This sum of 13s. 1d. represented the difference in value between sterling and New Zealand currency as applied to the amount of £2 12s. 6d. expressed in the coupon.

The rights and liabilities under the debenture and the coupon depend on the terms set out in them. For the purposes of this appeal, the question can be considered as if the instrument simply provided for payment in London; the option to require payment in New Zealand may be disregarded as the actual or assumed basis of the proceedings is that the London option has been duly exercised. The instruments as already stated bear on their face a reference to the Local Bodies Loans Act 1913 (hereinafter called the Act of 1913) and section 26 of the Appropriation Act 1915. The latter Act is not material, but the former Act requires to be considered. The appellant corporation are a statutory body incorporated in New Zealand and are subject to the Act of 1913, which contains a code regulating the conditions and the procedure under which a local authority such as the appellant corporation are entitled to borrow money for public purposes, including the purchase or acquisition of any land, building, erection or structure. It is not disputed that the appellant corporation are bound by the conditions of the Act, and that these conditions are made part of the terms of the debenture and coupon by the express reference to the Act already mentioned. The various requirements of the Act for the purpose of obtaining the consent of the ratepayers were in form duly complied with. The Act also provided for the security which might lawfully be pledged for a loan. Certain sections of the Act which have been the subject of argument before their Lordships call for special mention. These deal in particular with the form and contents of any debentures. Thus it is enacted that the debentures shall be for sums of not

less than £20 and not more than £1,000, and shall be in the form set out in the schedule. That form was precisely followed in the series of debentures in question. The matter most material to be noted is that the debenture in the scheduled form is to be for [blank] pounds, using the symbol £. This agrees with the provision in the body of the Act just quoted that the sum is to be for not less than £20 and not more than £1,000. The Act also prescribes that the yearly interest on every debenture shall not exceed $5\frac{1}{2}$ per cent., and shall be payable half-yearly or otherwise. There is also a prescribed form of coupon, which requires the amount to be expressed in pounds. The coupon in question complies with the prescribed form. Section 29 (1) provides that the local body may appoint any incorporated company or association or any such company or association together with one or more persons within or out of New Zealand to be agents for raising and managing any loan authorised to be raised under this Act, such agent to have full power to raise the loan and to deal with the moneys subject to the direction of the local authority. The Act also contains a series of provisions dealing with the repayment of the loan, of which the most material are section 32 which provides that the sum of money named in any debenture shall be payable at the place within or out of New Zealand named in the debenture at the time named thereon, being not longer than fifty years from the issue thereof, and section 33 which requires the local authority to make provision for a repayment either by means of a sinking fund, or by periodical drawings. Section 42 may also be mentioned. That section provides for the case of default being committed in payment of the sum secured by any debenture or any coupon when it is presented at the place where, and the time when, it is payable or subsequently. In that event the holder is entitled to apply to a Judge of the Supreme Court (that is of New Zealand) by a petition in a summary way for relief under the Act, and the Judge is authorised to appoint a receiver of the local fund or other property of the local authority which is liable under the provisions of the Act for the payment of the debenture or coupon.

In 1913 when this Act was passed, the gold sovereign was legal tender both in England and New Zealand, and the various notes current in both countries were redeemable in gold. In both countries the unit of account, the pound, was the same. The word "pound" accordingly at that time, whether used in an instrument made in New Zealand, or in an instrument made in England, had, in the full sense of the term, the same connotation; it meant the same unit of account, and the measure of value in currency which it connoted was the same, namely, the gold sovereign, minted by the Royal Mint, whether at the English Mint or at its Australian branch or branches. It is not necessary here to deal specifically with shillings and pence; these also were the same in both countries as units of account, and were represented as measures of value in currency by silver and bronze token coins. On the outbreak of the Great War in

August of 1914, changes were made in the currency in each of the two countries. Both in England and in New Zealand gold coins for all practical purposes went out of circulation. In England the export of gold, which had previously during the War been prohibited by regulation, was prohibited by an Act of 1920. In 1925 by the Gold Standard Act of that year the Bank of England, which had been under an obligation to pay its own notes and the Treasury notes then current in gold, was relieved of that obligation, and was only required to sell bullion in bars of about 400 oz. at a fixed rate. Then in 1931, by the Gold Standard Amendment Act of that year, the obligation to sell gold bullion at a fixed rate was suspended. Thus in England by 1931 the country had gone off the gold standard and the notes of the Bank of England which constituted the note circulation were no longer convertible in gold. In New Zealand a somewhat different course was taken. Before 1913 there were a certain number of trading banks in New Zealand issuing their notes of a denomination of £1 or upwards, which were in form promises to pay a pound or pounds sterling. In 1914 there was passed in New Zealand the Banking Amendment Act, 1914, under which the Governor in Council was empowered by proclamation to declare that notes payable on demand by any bank named in the proclamation and subsequent issues, should be, during the period limited by the proclamation, legal tender in New Zealand. While any such proclamation was current, the condition that the bank should pay notes of its own issue in gold on presentation at the bank was to be suspended for the period limited by the proclamation first made under the Act or by successive proclamations, if more than one. But the Act provided that the Governor in Council might require that adequate security should be given by the bank for the performance of the condition that the bank would duly pay its notes in gold after the expiration of the period limited by the proclamation or proclamations. During the period limited by any proclamation the export of gold was prohibited, except with the consent in writing of the Minister of Finance. In fact a proclamation was made in 1914 under this Act for two years and thereafter further such proclamations were successively made from time to time. These proclamations covered the whole period from August, 1914, until August, 1934. At that latter date the Reserve Bank of New Zealand Act, 1933, came into operation, under which the Reserve Bank of New Zealand was empowered to issue bank notes and the authority of the various trading banks to issue or re-issue bank notes in New Zealand was determined. Thereupon the bank notes of these banks practically went out of circulation. The bank notes of the Reserve Bank, which are now practically the only notes in circulation in New Zealand, are in form a promise to pay so many pounds, and contain no reference to sterling, unlike the notes previously issued by the trading banks. The position in effect has thus been that from 1914 until 1934 the redeemability of the note currency in gold was suspended. No doubt the Act of 1914 was originally intended to be an

emergency measure for the time, but by the successive renewal of proclamations the operation of the Act was continued until in 1934 the note currency was finally and definitely made irredeemable in gold. These respective changes in the legal tender or currency of the two countries have had a reflection in the rate of exchange and in the relative values *inter se* of the two currencies. If regard is had to the telegraphic selling rates, New Zealand on London, there had before 1914 been a variation depending, presumably, on the relation of supply and demand. Thus from 1904 to 1914 the rate, New Zealand on London, was at 17s. 6d. per cent. premium. From December, 1917, to September, 1920, it was 20s. per cent. premium. It then rose for about two years, but in 1922 it was 5s. per cent. premium and in 1924 for a short period it was at par; in 1925 it was at a discount; in 1930 the premium had actually risen to £5. Eventually in 1933 there was a steep rise in the premium; in January, 1933, the exchange stood at £125 New Zealand for £100 London, and in August, 1934, at £124 10s. It was in consequence of that marked divergence in value between the two currencies that the present difficulty has arisen. Until that occurred the debenture coupons in cases where the London option was exercised were paid in English currency without question. But the appellants in and after 1934 contended they were only bound to pay in New Zealand currency, and in the result the present action was brought.

The case was tried in the Court of Appeal under an order for removal to that Court on an agreed statement of facts. The Court was divided in opinion. The majority, consisting of Ostler, Blair and Kennedy, JJ., were of opinion that the claim of the respondents should be upheld. Reed, A.C.J., dissented and was for deciding in favour of the appellant corporation. He was of opinion that the New Zealand pound was a different unit of value from the English pound, and was of a different value from the English pound, and that in all the circumstances of the case the proper inference to be drawn was that the moneys to be paid under the debenture and the coupon were to be computed in the New Zealand currency, free from any allowance or deduction for conversion from New Zealand currency into English currency. In his view the contract was a purely New Zealand contract because it was made under the authority of the municipal law of New Zealand, and in reference to the purchase of an undertaking which was operated in New Zealand, and because repayment of the money was secured on property situated in New Zealand, and also because the debentures were delivered in New Zealand to be disposed of as the vendors of the tramway undertaking thought fit. He also relied on the circumstance that the contract was subject to the terms of the Local Bodies Loans Act of 1913. The three Judges who took the contrary view were of opinion that in principle the case was governed by the decision of the House of Lords in the case of *Adelaide Electric Supply Company, Limited v. Prudential Assurance Company, Limited*, [1934]

A.C. 122, and accordingly that moneys payable on the debenture or the coupons, if the bearer elected to be paid in London, were payable in the appropriate number of pounds according to the currency of England, that is, in sterling or in British pounds. Though the proper law of the contract was New Zealand law, that did not affect, in their opinion, the result in this case that where the place of payment was in London, the money was payable in sterling. They further held that there was nothing in the terms of the Act of 1913 to lead to any other conclusion because they held that it was not *ultra vires* to contract loans such as those in question in any other than New Zealand currency, and that the terms of the Act did not compel, irrespective of the place of payment, a construction of the word "pound", connoting a payment according to the currency of New Zealand.

Their Lordships are in substantial agreement with the conclusions of the majority of the Court. Up to a point, in their judgment, this case in principle is precisely governed by the opinions of the House of Lords in the *Adelaide* case. That authority, it is true, had reference to a contest whether sterling, that is, English currency, or Australian currency, was applicable, but for all purposes of the present appeal, there is no difference in substance between the divergence which occurred in the currency values as between England and Australia, and the divergence which occurred in the currency values as between England and New Zealand. There are two dates which in a case of this sort may have to be considered as material dates; one is the date when the contract is made, and the other is the date at which the contract requires payment to be effected. It is as at the latter date that the measure of value expressed by the word "pound" in the contract will have to be ascertained, and that will depend on the precise state of the relevant currency at the particular date, but it is as at the date of the contract that it must be decided what currency is meant by the contract as the currency or measure of value in which the contract obligation is to be discharged. That latter question can only be settled by determining as a matter of construction what in all the circumstances of the case, is the meaning of the word "pound" used in the contract. This problem only arises where the contract uses a common unit of account, like the pound, as the denomination in which the obligations are expressed. A difficulty arose in the *Adelaide* case, because in 1921 a change was made in the articles of association of the Adelaide company, which was an English registered company, whereby the place of payment for the debenture was shifted from London to Adelaide in Australia. Up to that time, while the place of payment was in London, there could be no question that the term "pound" used in the articles of association had reference to English or sterling currency. In 1921 when the articles were changed in the sense explained there were no express terms inserted to define in what currency the payment was to be made. The reason for that omission no doubt was that the parties did not think

about it because at that time the difference between the sterling pound and the currency pound was little more than negligible; indeed it could not definitely be pronounced in what direction the exchange would go, whether in favour of London or Australia. But when, at a much later date, namely 1931, there emerged a very substantial divergence in the values of the two currencies, the problem was raised which was eventually settled by the House of Lords. The five Lords of Appeal who gave judgment in the House of Lords were all in agreement as to what the decision of the House should be. Lord Russell puts the problem and the answer in these terms: He says:

“If this be the correct view, this problem would resolve itself into a case of the company becoming indebted from time to time in amounts payable in Australia and expressed in terms of units of account common to Australia and England. The question then is, how can the company discharge that indebtedness? The answer can, I think, only be in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account. It is a question of discharging a debt incurred in terms of units of account common to more than one country, in the currency which is legal tender in the particular country in which the debt has to be paid.”

It is quite clear that the whole problem arose because of the divergence in value of the two currencies, and it was solved, as a question of construction, by determining what currency, on the true construction of the contract, was connoted by the use of the word “pound.” It was held that in the absence of express terms to the contrary, or of matters in the contract raising an inference to the contrary, the currency of the country in which it was stipulated that payment was to be made was the currency meant. Contracts are expressed in terms of the unit of account, but the unit of account is only a denomination connoting the appropriate currency. The problem is only likely to arise where the contract is made at a time when there is little or no practical difference between the two currencies of the two countries concerned, or where they have both the same currency and the same unit of account, but subsequently at the due date of performance the values of the two currencies have sharply diverged. If at the time when the contract is made, there is a practical divergence in value between the two currencies, the parties in all probability will expressly stipulate what currency is intended. An illustration of such a case is to be found in *Westralian Farmers, Ltd. v. King Line, Ltd.*, 43, Lloyds List Reports, page 378. A charter-party made in September, 1930, for the charter of a British ship on a voyage from Western Australia to Great Britain or the Continent contained various stipulations for payments, some to be made in Australia and some in Great Britain. The latter were stipulated to be payable in sterling, but the former sums were stipulated to be payable in Australian currency. The parties had thus by their express agreement excluded any question as to what currency was intended. It

seems also that *Saskatoon v. London & Western Trusts Co., Ltd.*, 1934, 1 D.L.R., page 103, was decided on the principle that there was in that case an express term, embodied in the by-laws under which the debenture was issued, providing that the debentures and coupons were to be payable in lawful money of Canada or in sterling money of Great Britain. The debentures were expressed in dollars, and it was held that the terms of the by-laws excluded all other methods of payment than a payment either in lawful money of Canada or in sterling money, and accordingly that the debentures, which were expressed in dollars, were payable in Canadian dollars, though they were made payable at the offices of the Bank of Montreal in New York or at the offices of the said bank in London, England.

In the *Adelaide* case, however, there was no express term to show what currency was intended by the word "pound." The House of Lords held that the true meaning of the word "pound" must be determined on the basis of a rule depending on a well-known principle of the Conflict of Laws, namely, that the mode of performance of a contract is to be governed by the law of the place of performance. That principle, no doubt, is limited to matters which can be fairly described as being the mode or method of performance, and is not to be extended so as to change the substantive or essential conditions of the contract; but when it applies, as in the *Adelaide* case, it has the effect of introducing into the contract the law of currency or legal tender governing in the place of payment as a mode or method incidental to performance. Thus where there is a common unit of account, to which the same denomination applies, as is the case with the word "pound" here, the debt expressed in the common unit of account must, in the absence of contrary evidence of actual intention, be discharged by payment in the currency of the place of payment. That was the decision in the *Adelaide* case, which, subject to a further matter, to be next discussed, governs the present case.

In this case, as in the *Adelaide* case, the pound is the common unit of account. It is true that at the date of the debenture there was little or no practical difference between the value of the New Zealand currency in New Zealand and the value of the sterling currency in England; no doubt for that reason the parties did not feel it necessary expressly to stipulate which currency was intended by the contract. That was left to be determined by the Court in accordance with the general principles of law, and in accordance with the place of payment which the bearer adopted under the option given to him. It has, however, been strenuously contended that there is a further factor to be taken into consideration here, namely, the conditions of the Local Bodies Loans Act of 1913. The material provisions of that Act have already been set out in an earlier portion of this judgment. It is contended on behalf of the appellants that the Act of 1913 takes this case out of the ruling in the *Adelaide* case on one or other or on both of two grounds.

It is said in the first place that the effect of the Act of 1913 was to render it *ultra vires* of the corporation to borrow in any other than pounds, that is to say, the pounds meant by the Act, which were New Zealand pounds, and that the contract must anyhow be so construed, whatever the place of payment, in order to prevent it being held *ultra vires* and void, on the principle *ut res magis valeat quam pereat*. It is further or alternatively contended on similar grounds that the *prima facie* rule of construction applied in the *Adelaide* case is excluded by the conditions of the Act of 1913 incorporated in the documents, which require that the debentures and coupons should be issued in pounds, that is New Zealand pounds, as being the pounds postulated by the Act of 1913. Their Lordships cannot accept either contention. They do not think any question of *ultra vires* arises. On the plain reading of the Act of 1913 they think that the "pound" contemplated and authorised by the Act means the common unit of account current in Great Britain and in various parts of the British Empire, and that the currency which it connotes in the case of any particular loan will be determined by the place, whether within New Zealand or outside of New Zealand, stipulated as the place of payment in the debenture. The sections of the Act of 1913 quoted above in this judgment show clearly that the place of payment contemplated by the Act may be a place either within or without New Zealand. This in particular appears from section 32 and from section 29 (1) and other sections which are quoted above. For obvious financial reasons, a country like New Zealand will desire to raise money in other than the local financial markets. Thus it may desire to float a loan in England or in one of the Australian States; if it floats such a loan and issues debentures expressed in pounds payable in London or in (e.g.) Melbourne, such a financial operation is within the conditions of the Act, and will carry with it, according to the rules of law now established, the consequence, that if nothing more is said in the debenture, the pounds in question will connote a currency either of England, if the loan is repayable in London, or of Australia, if the loan, for instance, is repayable in Melbourne. That such a loan is within the provisions of the Act of 1913 has already been recognised by the Court of Appeal in New Zealand in the case of the *Australasian Temperance and General Assurance Corporation, Ltd. v. Mount Albert Borough*, 1936, New Zealand Law Reports, 54. In that case the debentures were issued in New Zealand under the Act of 1913 payable at the Bank of New Zealand, Melbourne, and were expressed to be in pounds. The question debated in that case was not the determination of the currency, but was whether the law of Victoria which had enacted a general reduction of the rate of interest payable in respect of loans, applied to the New Zealand contract, under which the interest on the loans was to be paid in Melbourne. The Court of Appeal in New Zealand held that it did not; they distinguished the *Adelaide* case on the ground that in the *Adelaide* case the question was merely as to the mode or method of performance, whereas in the case

before them the Victorian law did not and could not have the effect of changing the substance of the New Zealand contract. It is, however, clear that the Court of Appeal treated the debentures as properly issued within the terms of the Act of 1913. A similar decision was arrived at by a majority in the High Court of Australia in the case of the *Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society*, 50 C.L.R. 581, where debentures of a New Zealand corporation had been issued payable in New South Wales, and the question was whether the rate of the interest was reduced under a New South Wales statute, the Interest Reduction Act, 1931, and its amendments. It was held that the debenture was a New Zealand obligation and was not affected by the Act. The case is here referred to merely as a further illustration of the practice of validly issuing under the Act of 1913 debentures payable in pounds, but payable in other than New Zealand currency, because not payable in New Zealand. A reference in the argument before their Lordships was made to a case of *Payne v. Deputy Federal Commissioner of Taxation*, [1936] A.C. 497, in which there was some discussion of the decision in the *Adelaide* case. The decision of this Board, however, in *Payne's* case throws no light upon the matters at issue here. The only question in that case was whether under the Australian Income Tax Acts an Australian taxpayer who had received assessable income in pounds sterling under English securities was compelled, in bringing sterling income received in England and not remitted to Australia into his income tax returns, to convert it to terms of Australian currency. It was held that he was.

For all these reasons their Lordships are of opinion that the appeal fails, and that the coupons in question are payable in English currency without any allowance for exchange and so also is the debenture when it falls due, always provided that the bearer exercises the option to be paid in London. They are also of opinion that the claim of the respondents to be paid 13s. 1d. succeeds. The judgment of the Court of Appeal in New Zealand will accordingly be upheld and the appeal dismissed. Their Lordships will humbly so advise His Majesty.

In accordance with an agreement between the parties, no order is necessary respecting the costs.

In the Privy Council.

THE MAYOR, COUNCILLORS AND
CITIZENS OF THE CITY OF
AUCKLAND AND OTHERS

v.

THE ALLIANCE ASSURANCE
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DELIVERED BY LORD WRIGHT.

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