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*May 27, 28.
*June 24.

THE GUARDIAN ASSURANCE COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

THE TOWN OF CHICOUTIMI (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Fire insurance—General conflagration—Acts of municipal officials—Demolition of buildings—Statutory authority—R.S.Q., 1888, *art.* 4426—*Indemnity—Subrogation — Tort — Transfer of rights to municipality—Liability of insurer.*

Article 4426, R.S.Q., 1888, empowers town corporations, subject to indemnity to the owners, to cause the demolition of buildings in order to arrest the progress of fires; in the absence of a by-law to such effect power is given to the mayor to order the necessary demolition. In the Town of Chicoutimi, no such by-law having been enacted, the mayor gave orders for the demolition of a building for the purpose of arresting the progress of a general conflagration and, in carrying out his directions, an adjacent building was destroyed which was insured by respondents for $4,700. The municipality settled with the owner by paying her $5,500, as full indemnity for all damages sustained, and obtained a transfer of her rights under her policy of insurance. In an action on the policy so transferred:—

Held (Duff J. dissenting), that, as the destruction of the building insured was occasioned by an act justified by statutory authority and full indemnity had been paid, the municipality was entitled to subrogation in the rights of the owner and to maintain the action against the insurance company for reimbursement to the extent of the amount of the insurance upon the property.

Per Duff J. dissenting.—Although the destruction of the building insured was occasioned by an act justified at common law, the rights of the municipal corporation were determined by the principle laid down in *Cité de Québec* v. *Mahoney* (Q.R. 10 K.B.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

378), and the claim for reimbursement to the extent of the amount for which the property was insured should not be maintained. *Quebec Fire Insurance Co.* v. *St. Louis* (7 Moo. P.C. 286) applied.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of Letellier J., in the Superior Court, District of Chicoutimi, by which the plaintiff's action was maintained with costs.

The circumstances of the case are sufficiently stated in the head-note and the issues raised on the present appeal are discussed in the judgments now reported.

Atwater K.C. for the appellants.

Belcourt K.C. for the respondent.

THE CHIEF JUSTICE.—I will state briefly the facts which I think are relevant and which are very simple. On the 24th June, 1912, a fire broke out on the Town of Chicoutimi which attained the portions of a general conflagration. In order to check the progress of this fire the mayor of the town ordered a house adjoining that of Mme. Claveau to be blown up by dynamite. The explosion involved the accidental demolition of Mme. Claveau's house as well.

The action of the mayor was authorized by article 4426 of the Revised Statutes of Quebec, 1888, which is as follows:—

To authorize certain persons to cause to be blown up, pulled down or demolished such buildings as may appear necessary in order to arrest the progress of any fire, saving all damages and indemnity payable by the corporation to the proprietors of such buildings, to an amount agreed upon between the parties, or, on contestation, to an amount settled by arbitrators.

In the absence of any by-law under this article, the mayor may, during the course of any fire, exercise this power by giving a special authorization.

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Mme. Claveau was insured in the appellant's office and the town having paid her the full amount of the damages which she sustained by the demolition of her house now seeks to recover from the appellant the amount of the insurance moneys.

Mme. Claveau would have had a right to collect these insurance moneys from the appellant and to recover from the town any further sum necessary to indemnify her for the destruction of her property. The town having paid the whole damage sustained by her is, I think, entitled to pursue the appellant for the value of the policies of the insurance.

In the case of *Simpson* v. *Thomson*(1), the Lord Chancellor in the course of his judgment referred to the

> well known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss.

I can see no difference in the present case except that the indemnity is provided by the statute instead of by agreement between the parties, and that does not appear to affect the principle.

In ordinary circumstances where A. has without any fault of his own damaged the property of B., A. is under no liability to indemnify B. for his loss. It is otherwise if A. was a wrongdoer, in which case he is liable to B. for the whole of the damage, and if B. recover any part of the loss from insurers, these latter are entitled to recover, in the name of B., the amount of their payment.

A statute may authorize the doing of an act which

(1) 3 App. Cas. 279, at p. 284.

without such authorization would be unlawful. In the present case the act of the council in blowing up a building to prevent the conflagration spreading might have been unlawful, but the statute legalized its action.

A statute may, however, as in the present case, impose upon an innocent party a liability to indemnify for damage caused by him.

Another instance of this may be found in the "Railway Act," R.S.C., 1906, ch. 37, sec. 298, as amended by 9 & 10 Edw. VII., ch. 50, sec. 10. By this section it is provided that:—

> Whenever damage is caused to any property by a fire started by any railway locomotive the company making use of such locomotive whether guilty of negligence or not shall be liable for such damage.
>
> Provided also that if there is any insurance existing on the property destroyed or damaged the total amount of the damages sustained by any claimant in respect of the destruction or damage of such property shall for the purposes of this sub-section be reduced by the amount accepted or recovered by or for the benefit of such claimant in respect of such insurance. No action shall lie against the company by reason of anything in any policy of insurance or by reason of payment of any moneys thereunder.

The legislature might have provided any indemnity it thought fit either, as in the case of the "Railway Act," expressly limiting it to the net loss after deduction of any insurance moneys or making it the total loss and so relieving the insurance company of its liability. In the absence of any express provision in article 4426 the question to be determined is the extent of the liability under the indemnity it provides. Is the indemnity to be interpreted by the principle which would apply in the case of a wrongdoer as being the total amount of the loss or only the net loss sustained by the owner after deducting from the total loss the amount for which the property was insured ?

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The respondent had not only a right, but a duty to destroy the property and unless the statute had provided for indemnity there would have been none. There is no reason to suppose that the statute meant to relieve insurance companies of their contractual liabilities, I think it merely intended to secure a complete indemnity to property owners for whatever loss they might suffer.

The case is different from the liability of a wrongdoer. In *Yates* v. *Whyte*(1), in which the plaintiff was suing the defendants for damaging his ship by collision and the defendants sought to deduct from the amount of damages to be paid by them a sum of money paid to the plaintiff by his insurers in respect of such damage, Chief Justice Tindal said:—

> If the plaintiff cannot recover the wrongdoer pays nothing and takes all the benefit of a policy of insurance without paying the premium.

In construing the indemnity provided by article 4426 to be given by an innocent party I do not think the principle governing the liability of a wrongdoer is to be looked to. On the contrary, I think the indemnity should be confined to the narrowest limits which the words of the statute will permit. I think it should be taken to cover the actual loss sustained after deducting therefrom any insurance moneys paid in respect thereof; it should not be held to relieve an insurer of liability in respect of which he has been paid a premium.

Whatever may be the rights of the insurer, under the English law, to subrogation upon payment to the insured of the amount covered by the policy, in my

(1) 4 Bing. N.C. 272.

opinion the insurance company is not entitled in the Province of Quebec, after subrogation, to recover from a third party who may be liable to the insured, where there has been no fault on the part of the third party. The only right of subrogation is contained in article 2584, C.C., which says:—

> The insurer on paying the loss is entitled to a transfer of the rights of the insured against the person by whose fault the fire or loss was caused.

In the present case the acts of the corporation were authorized by statute. There was, therefore, no fault and the insurance company, if they had paid the insured, could not have recovered back the amount so paid, from the corporation.

The whole subject is fully and very learnedly discussed in La Revue Trimestrielle de Droit Civil, vol. 5, 1906, at page 37. See also Planiol, Droit Civil, vol. 2, Nos. 2142 and 2143 and Labbé's note to S.V. 80.1. 441.

The appeal should be dismissed with costs.

IDINGTON J.—The appellant had insured one Madame Claveau in respect of a house, in the town of respondent, against loss by fire.

In a disastrous fire the mayor of respondent directed the use of some explosive to be applied to an adjacent house in order to arrest the progress of the fire. In so using the explosive not only was the house to which it was applied blown up, but that of Madame Claveau was also destroyed. The operation was successful in arresting the fire. The respondent town was threatened by Madame Claveau with a claim for damages and settled with her for an amount in excess of the amount of her insurance, upon the condition that

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she should assign to the respondent her claim under the policy of insurance issued to her, to indemnify her against loss, and she accordingly assigned to it, contemporaneously with and as part of the settlement, her claim (if any) against the appellant upon the policy in question. The respondent then sued appellant thereon. The learned trial judge allowed the claim and this the court of appeal has maintained. The appellant contends it is not liable because it alleges the respondent was primarily liable therefore.

Of course, if this can be maintained as a legal proposition the appellant should succeed. It is just there in my view that the case turns. For if the insurer can shew that the respondent was a wrongdoer and in law liable for the loss, then it could pay the insured and have recourse over against the respondent as a wrongdoer.

There may be, under other circumstances not present to my mind just now, possible cases where such right over or of subrogation might exist. But in this regard the appellant seemed to me in argument singularly weak.

I could not on the argument elicit from able counsel for the appellant any authority substantiating such a proposition as resting upon the facts herein would have entitled his client to an assignment of Madame Claveau's rights or otherwise in any way of subrogation as against the respondent.

Much reliance was placed upon the positions taken by respondent in the court below and in its dealings with the insured in way of acknowledgment of liability to her which seem to me entirely irrelevant.

It is not what respondent or its advisors imagined the law to have been, and her legal rights resting

thereon to have been, that should have any weight with us.

We must decide upon what we conceive to have been the actual legal rights of the parties and discard all such other imaginary legal positions as irrelevant.

If respondent was a wrongdoer, and in law liable therefor, the appellant is entitled to so answer any claim it (the respondent) may have imagined it either had or could acquire as against the appellant.

In that case, repeating what I have already said, the appellant in virtue of its right of recourse over could not be held liable herein.

The respondent, however, was not a wrongdoer, by reason of what was done, because the mayor, who ordered that to be done which was done, had the legal warrant embodied in the last part of the section 4426 of the Revised Statutes of Quebec of 1888, which is as follows:—

> In the absence of any by-law under this article, the mayor may, during the course of any fire, exercise this power by giving a special authorization.

To my mind it is exceedingly doubtful if, armed with such authority, he or those he represented, could be held liable for anything. That authority when acted upon might produce great hardship, but I fail to see how a man so acting could be said to have committed any legal wrong.

Of course, there is an argument for the construction of the section just quoted which might imply a right of indemnity, as in the case of a by-law authorizing such action as provided for in the section.

Assuming that argument good and liability resting upon the statute, what should be the measure of damages?

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It does not appear to me that a person fully insured against loss could claim to have been damnified thereby. Her damages should be measured by the actual loss she sustained. And the insurance which she was entitled to have received must in such case have gone in reduction of the aggregate amount of such damages, and the assessment be made accordingly.

The course of events has been such that, instead of her suing therefor, she has compounded with the respondent upon the terms which entitled her to receive what she suffered, but upon the condition of subrogating conventionally respondent to her rights as against appellant. She might have accepted from respondent the part of the sum total in excess of the insurance and have sued the company. In that view I can see no reason for appellant's complaining.

The appellant primarily was liable and possibly has secured by what respondent's mayor did, great benefits beyond what appear herein.

Of this latter suggestion we have no evidence and it weighs naught with me save as an illustration of the legal position in which appellant stands.

The cases cited do not help. The principles upon which they proceed are either against appellant or irrelevant to the peculiar facts of this case.

The *Mahoney Case*(1) may be perfectly good law. I express no opinion thereon, but it does not touch what is involved herein.

The leading cases upon subrogation in relation to the rights of an insurer are lucidly explained in Bunyon on Insurance. I can find nothing in that or the

(1) Q.R. 10 K.B. 378.

cases so referred to justifying this appeal. Take the case of *Castellain* v. *Preston*(1), at page 388, where the exposition of the law by Brett L.J. is as follows:—

> Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished.

This covers the whole of the subject matters out of which the right of subrogation can arise to the insurer. There is nothing of a contractual nature in question therein.

And, as already shewn, there is nothing in the way of tort which in any way can found a right in the insured to be acquired by the insurer. Any right the insured had must rest in the right to be indemnified. She got that only to the extent of her actual loss, less what she had covered by the appellant's insurance which she chose to assign rather than follow.

In doing so she gave nothing appellant was entitled to claim.

I have given most careful consideration to the several articles of the Civil Code dealing with the subject of subrogation in general and to the subject of insurance in particular, to which we were referred in argument.

(1) 11 Q.B.D. 380.

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I cannot find therein anything essentially different from the principles expounded in said authorities as I read them.

Article 2584, C.C., seems that most directly applicable to this case. It is as follows:—

2584. The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused.

I do not think this case falls within that. Indeed, it seems possibly narrower than the rule of Brett L.J. above quoted. If there is any difference in their effect, preference should be given to the article.

It is exceedingly desirable there should be no difference in the laws governing such a subject.

If there had been legal negligence shewn in the doing that which was done, the result might have given rise to the application of the doctrine in that case, or legal principles outside that case.

I can find no negligence, and, indeed, though suggested, that ground was not much relied upon or pressed as it appeared to me.

The appeal should, therefore, be dismissed with costs.

DUFF J. (dissenting).—The respondent municipality does not dispute that it became, by reason of the act of its officials in causing the destruction of the house of Madame Claveau, bound to make reparation to her for the loss thereby suffered by her. The payment to Madame Claveau was made on that footing. That is the position taken by the respondent in its pleadings, in its factum filed in this court, and by counsel in the argument. This responsibility, accord ing to the position taken by the respondent, rests upon

the principle of law upon which the Court of King's Bench proceeded in *Cité de Québec* v. *Mahoney*(1). The Court of King's Bench in this case has refused to apply that principle on the ground that the evidence shews the destruction of the property and progress of the fire to have been manifestly inevitable when the officials of the municipality took action; but the respondents have admitted their responsibility and the applicability of the common law principle on which the case of *Cité de Québec* v. *Mahoney*(1) proceeded, and do not support the decision below upon the ground taken up in the *considérants* of the judgment. The respondent, in its factum, says:—

Was respondent bound in law to pay the loss caused by the demolition?

The only similar case which we have been able to find is that of the *Cité de Québec* v. *Mahoney*(1).

The majority of the Court of King's Bench, confirmed the judgment of the Superior Court by which the City of Quebec had been condemned to pay $400 for a demolition made under circumstances similar to those in the present case, on the ground that municipal corporations, representing the whole community, are bound to indemnify those who suffer loss by reason of the exercise of municipal authority, when such is done in the interest of the municipality. Whilst the Chief Justice in the King's Bench was dissenting he did so because there was not in his opinion sufficient evidence that the demolition had been ordered by the municipal authority, because the house so demolished had not been attacked by the fire and would not have been burnt as the fire had been put under control at the fifth house from the one so demolished, and because article 4426, Revised Statutes, Quebec, concerning demolitions, was not applicable to the City of Quebec, the latter being provided with a special charter.

The Honourable Mr. Justice Letellier, who gave the judgment in the present case, considered himself bound by the decision above quoted *and adopted the reasoning thereof.*

In England and in the United States the right to demolish under similar circumstances and the right to indemnity have been sanctioned repeatedly and the jurisprudence in these countries recog-

(1) Q.R. 10 K.B. 378.

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nizes the right of a proprietor of a building demolished for the purpose of staying the progress of the fire to receive an indemnity, to be paid either by the municipal corporation or the insurance companies. The court of appeal in the case of *Mahoney* based its decision on French law, which is the law that governs questions of civil responsibility, and upon articles 677, Municipal Code, and 4426, Revised Statutes, Quebec, 1888.

Article 5638 of the present Revised Statutes, 1909, has replaced article 4426, and gives the right to demolish without dealing with the question of indemnity. The result is that the indemnity is left to the discretion of the court and is to be granted or not according to the facts of each case. The indemnity is one that exists by common law. The former article 4426 provided that in the absence of any by-law the mayor could order the demolition in case of fire.

Article 5638 does not so provide, but this right exists notwithstanding; it is a common law right. The learned trial judge very justly remarked in his notes that it is not when the fire is doing its ravaging work that the municipal council can meet and adopt a by-law to authorize the mayor to give an order of demolition.

The town did not have any by-law on the subject; the mayor, as such, gave the order in the interest of all; his action was subsequently ratified by the municipal council, which authorized the payment of the indemnity to Madame Claveau. The Town of Chicoutimi is subject to the general laws governing cities and towns.

The order of the mayor, ratified by the council, put an end to a vast conflagration which threatened to spread all over the town and which would have caused still far greater damages. The demolition was not only a measure of prudence; it was urgent and necessary. Without it, the whole east ward would have been burnt and other wards of the town as well. The object of the demolition, which was to circumscribe the fire, was secured fully and the fire was stayed at the building which was demolished and on both sides of the street. Under the circumstances the town was legally authorized and bound to indemnify the proprietors who suffered by reason of such demolition.

Before the Court of King's Bench the appellant, in its factum, admitted that the conclusion arrived at by the court of first instance on this point must be adopted.

I think the respondent's counsel is right in his contention that article 4426, R.S.Q., 1888, has been superseded by article 5638, R.S.Q., 1909, but, by reason of the position taken by the respondent, I do not think it is incumbent upon me to consider and I do not consider whether or not, by reason of the evidence to

which the Court of King's Bench refers, the principle of the *Cité de Québec* v. *Mahoney*(1) is inapplicable here.

The contention of the respondent on this branch of the case is, and it is on this contention that I think the respondent fails, that admitting the principle of the *Mahoney Case*(1) to be applicable the proprietor's right to reparation is only for the amount of his loss after taking into account the value of any insurance of which he may be entitled to the benefit.

I do not think the right to which effect is given in that case is so limited.

I quote from the judgment of Cimon J., at p. 401:—

Favard de Langlade, Repert. vbs. expropriation pour cause d'utilité publique, par. XIV.: "Si la dépossession a lieu dans l'intérêt particulier, comme, lorsque, pour arrêter un incendie, on abat une maison afin de préserver les édifices voisins, l'indemnité doit être payée par tous ceux dont on peut prévoir que les maisons ont été sauvées." Proudhon, Usufruit, no. 1594, dit la même chose.

Et, en passant au droit français plus moderne j'y trouve encore, comme résultat, qu'on assimile le cas à la doctrine du jet de mer, bien que plusieurs appelent cette démolition une expropriation tacite; et il en résulte que le propriétaire de la maison abattue a droit à une indemnité.

Seulement, avec le système des municipalités, ou, plutôt, le système communal en France, ce ne sont plus les voisins à qui le propriétaire de la maison démolie doit s'adresser, car ces voisins sont confondus dans la commune, et c'est pour le salut public de la commune que la démolition a eu lieu: il faudra que le propriétaire de la maison démolie s'adresse, pour son indemnité, à la commune, d'autant mieux qu'elle a le contrôle des mesures à prendre pour combattre l'incendie.

M. le conseiller Almeras Latour, dans son rapport de la cause de la *Commune de Chareton c. Gillet*(2), résume ainsi la doctrine:—

"D'après le jugement, nous ne sommes pas en présence d'une faute, d'un accident; nous avons devant nous un fait correspondant à un intérêt public, une mesure pratiquée dans le but de s'opposer au progrès d'un incendie. En pareil cas, la demande de sieur Gillet se retranche dans les principes ordinaires du droit civil. Le dommage souffert ou les frais faits par un seul, profitant à la généralité des

(1) Q.R. 10 K.B. 378. (2) D.P. 83.1.211.

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habitants, la commune doit indemniser celui qui a coöpéré ainsi à la conservation de tous. C'est absolument comme en cas de guerre, la contribution payée par un seul dans l'intérêt de tous; c'est le jet a la mer, qui, en sauvant le navire, oblige à repartir la perte sur ceux qui en ont profité."

Dans une cause devant la cour de cassation, sous la présence de M. Troplong, une démolition est, en pareil cas, appelée "expropriation" (D.P. 66.1.75). Je crois cette qualification impropre. Mais qu'importe l'expression!

There is here no trace of any such restriction and the analogies suggested "la doctrine du jet de mer" and "expropriation tacite" are not consistent with the existence of such restriction.

As to the amount of the loss, that has been ascertained by the agreement of the parties. What then is the position of the appellant company?

The contract of insurance is a contract of indemnity and I think that according to the law of Quebec the appellant company would have been entitled, on payment of the loss, to be subrogated to Madame Claveau's rights against the municipality.

The French version of article 4584, C.C., is clear upon the point. The English version creates a difficulty. The two versions are as follows:—

2584. L'assureur, en payant l'indemnité, a droit à la cession des droits de l'assuré contre ceux qui ont causé le feu ou la perte.

2584. The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons by whose fault the fire or loss was caused.

I shall assume that the right admitted by the municipality resting on the principle of *Cité de Québec* v. *Mahoney* (1) is not a right of action for a "fault." This does not conclude the matter. Article 2615, C.C., provides that where the French and English versions differ that version is to be accepted which most nearly accords with the existing law.

(1) Q.R. 10 K.B. 378.

I have come to the conclusion that the right of subrogation enjoyed by insurers under French law being an equity arising out of the fact that the contract is a contract of indemnity is not limited to a right to have the benefit of the obligations springing from the wrongful destruction of or injury to the property insured.

Such a view would not be consistent with the doctrine of Pothier (ed. Bugnet), vol. 5, "Assurance," art. 161:—

Lorsque les assureurs ont indemnisé l'assuré des pertes et dommages qui ont été causés pour le salut commun dans les marchandises assurées ils doivent être subrogés aux droits de l'assuré dans la contribution qui doit se faire en ce cas.

The rule of the French law in 1830 is stated by Quenault, arts. 325 and 326, in these words:—

325. Le paiement de l'assurance n'opère pas seulement en faveur des assureurs l'effet dont nous venons de parler. Il a encore pour effet d'obliger l'assuré à subroger les assureurs qui le paient, dans les droits, recours et actions en indemnité qu'il aurait par rapport à la chose assurée.

Cet abandon des actions de l'assuré au profit des assureurs semble une conséquence forcée des principes qui dominent la matière. En effet si l'assuré pouvait, après avoir obtenu des assureurs l'indemnité de sa perte, exiger encore de l'auteur du sinistre la même indemnité, à titre de dommages-intérêts, l'assuré trouverait dans le sinistre une source de bénifices, puisqu'il recevrait deux fois la valeur de ce qu'il aurait perdu. Les principes qui régissent le contrat d'assurance s'opposent à un pareil résultat; ils veulent que ce contrat ne devienne point un titre lucratif pour l'assuré, et conséquemment, que l'action qui en résulte en sa faveur ne puisse être cumulée avec une autre action tendente à obtenir l'indemnité de la même perte. L'assuré ne peut donc se faire payer par les assureurs l'indemnité de sa perte, qu'à la condition d'abandonner les autres actions en indemnité, qu'il aurait à exercer à raison du même sinistre.

326. Si l'assuré se refusait à faire cet abandon au profit des assureurs, ils pourraient obtenir que le montant de l'indemnité susceptible d'être recouvrée contre l'auteur du sinistre fut déduit de la somme qu'ils auraient à payer à l'assuré; et cela, en vertu du même principe que les autorise à déduire de cette somme la valeur des

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débris de la chose assurée conservés par l'assuré. L'assuré, pour éviter qu'on impute sur l'assurance le montant d'une indemnité, qu'il n'est pas certain de recouvrer contre l'auteur du sinistre, a évidemment intérêt à subroger les assureurs dans tous ses droits contre ce dernier. Mais quelque conforme aux principes du contrat d'assurance que soit cette subrogation, elle a besoin d'être formellement consentie par l'assurée.

Duff J.

The principle governing the rights of an insurer in this connection was considered in the judgment of Parke B., in 1851, in *Quebec Fire Assurance Co.* v. *St. Louis*(1), at pages 316 and 317. I quote the passage which gives the *ratio decidendi*:—

> The learned counsel for the plaintiffs admit that they did not fall within the description of persons who are subrogated by operation of law without requisition to or convention with the creditors, nor strictly to the class of co-obligors or sureties, to whom Pothier, "Coutume d'Orléans," tit. xx., sec. 5, p. 846, ascribes the right of requiring the creditors, when they pay the debt, for which they are jointly bound or responsible to him, either to subrogate or discharge them. But the learned counsel contended that an assuree, by a policy against either maritime or terrestrial risks, is clearly within the equity of the rules and has a similar right to require a subrogation at the time of the payment of the loss. The authorities cited in support of that position seem to us to establish that the assurees have that right; they are: Alauzel "On Assurance," p. 384, s. 477; Pardessus, "Cours de Droit Commercial," 595; Quinault, p. 248; Touiller, tit. 4, s. 175; Emérigon (English trans., 1850), ch. xii., s. 14, pp. 329-336; and Pothier "On Assurance," 248, who lays it down that in the case of a general average, the assurer, after having indemnified the assured against the losses sustained for the common benefit, ought to be subrogated to the rights of the assured, to the contribution, which in such case must be made. These authorities are so consistent with justice, and founded upon so equitable a principle, that we have no difficulty in adopting them; and we do not think that any of these are shewn to have been derived, as was suggested in argument, from the Code Napoleon, which is not in force in Canada.

I think the present case is well within the authority of this passage. I should add that I have not found it necessary to consider the contention of the

(1) 7 Moo. P.C. 286.

appellant company that the act of the mayor was a wrongful act or whether, assuming it were so, the municipality would be responsible or whether, in the circumstances, Madame Claveau in strict law would on that hypothesis have acquired a right to more than nominal damages. I have considered the case upon the footing upon which the respondent municipality has from the beginning put it, namely, that the act of demolition was a rightful act under powers vested in the municipality at common law and that the doctrine of the decision in *Cité de Québec* v. *Mahoney*(1) governs the determination of the appeal and that the municipality was responsible to make reparation according to the principle enunciated in the passage quoted above from the judgment of Cimon J.

On this footing I think the contentions of the appellant company ought to prevail over those of the municipality.

ANGLIN J.—Incorporated by 57 Vict. ch. 66 (Que.), the Town of Chicoutimi is governed by the provisions of the "Town Corporations' General Clauses Act," 1888, articles 4178, *et seq.* Applicable to towns incorporated prior to 1903 which have not been subsequently taken out of its operation (R.S.Q., 1909, art. 5884), this Act is still in force and unrepealed. See R.S.Q., 1909, vol 4, p. 373. By articles 4389 and 4426 of the Revised Statutes of Quebec, 1888, town corporations are authorized to pass by-laws

4426. To authorize certain persons to cause to be blown up, pulled down or demolished, such buildings as may appear necessary in order to arrest the progress of any fire, saving all damages and indemnity payable by the corporation to the proprietors of such buildings to an

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amount agreed upon between the parties, or on contestation to an amount settled by arbitrators. In the absence of any by-law under this article, the mayor may during the course of any fire, exercise this power by giving a special authorization. (40 Vict. ch. 29, sec. 251.)

It does not appear upon the record that any by-law such as is authorized by this article was passed by the Town of Chicoutimi. But the demolition of Mme. Claveau's house resulted from the blowing up of the adjacent Tremblay residence under the special direction of the mayor, and the liability of the municipal corporation to the owner was, in my opinion, the same as if the work had been carried out under the provisions of a by-law. This, I think, is the effect of the words "may exercise this power" That the demolition of Mme. Claveau's house was not directed or intended, but was occasioned by the use of an excessive charge of dynamite in blowing up the Tremblay residence, owing to a desire to insure the complete destruction of the latter, does not, in my opinion, suffice to take the present case out of the purview of article 4426, or to render the mayor or the municipal corporation liable therefor *ex delictu*. Under the circumstances — regard being had especially to the emergency which called for prompt and effective action — a case of fault has not been established against them under article 1053, C.C., in respect of liability for which the appellants might be entitled to subrogation. Article 2584, C.C., and report thereon of the Codification Commissioners.

Upon consideration of the scope and purpose of article 4426, R.S.Q., 1888, I am convinced that it was not the object of the legislature, in enacting it, to indemnify insurance companies against losses occasioned to them through the demolition of buildings

pursuant to its provisions for the purpose of arresting the progress of fires. The intention was, in my opinion, to subject the municipality to liability to the proprietor of any building so demolished for his own benefit, and not through him for the benefit of any insurance company interested, for the net loss which he would sustain in consequence — that is, for his damages over and above any indemnification to which he might be entitled under the provisions of any insurance policy. The fact that in most cases where buildings are demolished under the provisions of article 4426 they would themselves, if not so destroyed, become a prey to the conflagration which their demolition is designed to arrest, with consequent liability of the insurance companies, seems to me to confirm the view that the construction which I put upon that article is what the legislature intended it should bear. Where the building demolished is not covered by insurance, or, for any reason not attributable to his own fault, the proprietor is unable to recover upon his insurance, the municipal corporation would, of course, be liable to the full amount of the value of the property destroyed. But where the owner is entitled to the benefit of insurance the amount thereof recoverable must be first deducted from the total value of the property destroyed in estimating the amount of damages and indemnity payable to him by the corporation. To place any other construction upon article 4426 would, I am satisfied, be to give it an effect not intended by the legislature. In my opinion, therefore, the statute did not subject the respondent to any liability in respect of the part of Mme. Claveau's loss covered by insurance, and she, therefore, had no such rights against it to which the appellants could claim subro-

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gation. As already stated delictual liability of respondents has not been established. On the other hand it is admitted by the appellants — and I think there is no doubt — that they were liable, under their policy, to Mme. Claveau. Her loss was caused "by the means used for extinguishing the fire" Article 2580, C.C.

In settling with Mme Claveau for the sum of $5,500 the municipal corporation insisted upon her assigning her interest in her policies of insurance with the appellant company, which she did. Although in making this settlement it was not explicitly stated that the municipality assumed liability only for the amount of Mme. Claveau's loss in excess of her insurance, it is quite clear that it was not intended by the payment made to her to satisfy or extinguish the liability of the appellants. If it were, the taking of an assignment of her claims under her policies would be meaningless. I think the proper interpretation of what was done is that the municipality intended to purchase Madame Claveau's rights against the insurance company and to pay to her, in discharge of its liability under article 4426, only the difference between the amount recoverable under her insurance policies and the sum of $5,500, the balance being the purchase price of the assignment of her claims against the insurance company. Her policies amounted in all to $4,700 and the loss recoverable under them has been fixed by the learned trial judge at $4,000. No appeal has been taken against this assessment of the amount of the appellants' liability. The assignability of Madame Claveau's rights accrued against the insurance company has not been questioned.

I am, for these reasons, of the opinion that the

judgment in appeal should be affirmed and this appeal dismissed with costs.

BRODEUR J.—Les faits qui ont donné lieu au présent litige sont les suivants:—

La compagnie appellante avait assuré la propriété de Madame Claveau, située dans la Ville de Chicoutimi. Le 24 juin, 1912, un incendie considérable s'est déclaré qui menaça de détruire la principale partie de la ville.

Le maire, après avoir consulté la brigade du feu et certains citoyens, a décidé de faire détruire par la dynamite certaines propriétés dans le bût d'arrêter la conflagration; et parmi les propriétés qui furent ainsi détruites se trouvait celle de Madame Claveau.

Madame Claveau s'est alors adressée à la corporation pour se faire rembourser la valeur de sa propriété. La municipalité, vu l'incertitude où elle était de savoir si elle était responsable ou non, a cru devoir régler avec Madame Claveau, mais en se faisant transporter l'assurance que cette dernière avait sur la propriété; et elle poursuit maintenant la défenderesse-appelante pour en réclamer le montant.

La compagnie d'assurance prétend qu'elle n'est pas tenue de payer à la ville, vu que cette dernière ne pouvait pas être, dans les circonstances, subrogée aux droits de Madame Claveau contre la compagnie d'assurance.

En vertu de l'acte des villes, art. 4426, S.R.Q. (1888), qui s'applique à la Ville de Chicoutimi, les corporations municipales ont le droit

d'autoriser certaines personnes à faire sauter, démolir et abattre autant de constructions qu'il paraît nécessaire pour arrêter les progrès d'un incendie, sauf les dommages et indemnités payables par la corporation aux propriétaires de ces constructions, au montant

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convenu entre les parties, ou sur contestation au montant fixé par les arbitres.

En l'absence de règlement fait en vertu de cet article, le maire peut, dans le cours d'un incendie, exercer ce pouvoir, en donnant une autorisation spéciale.

Dans le cas actuel il ne paraît pas y avoir eu de règlement de passé par le conseil municipal de la Ville de Chicoutimi; mais, en vertu de la loi dont nous venons de lire le texte, le maire pouvait certainement pendant la conflagration ordonner de détruire et de démolir toute propriété qu'il jugerait nécessaire afin d'arrêter le progrès du feu.

Dans ce cas-là, il serait obligé cependant d'indemniser le propriétaire de ces bâtisses.

Nous retombons virtuellement sous les dispositions de l'article 407 du Code Civil qui dit que nul ne peut être contrait de céder sa propriété si ce n'est pour une cause d'utilité publique et pour une juste et préalable indemnité.

L'intérêt public commandait, dans les circonstances exceptionelles où on était, de détruire les bâtisses en question. Mais le propriétaire avait le droit alors de se faire indemniser ainsi que la loi le déclare et ainsi qu'il a été décidé d'ailleurs dans la cause de *Cité de Québec* v. *Mahoney*(1).

Si la ville eût été en faute, la subrogation aurait été de nul effet parce que la compagnie d'assurance, en acquittant sa dette, aurait eu le droit de se faire céder les droits que le propriétaire avait contre ceux qui par leur faute avaient détruit la propriété.

Mais dans le cas actuel il n'y a pas de faute qui puisse être imputée à la ville. Le maire a fait ce que la loi l'autorisait de faire. Il n'y a donc pas eu de délit de sa part.

(1) Q.R. 10 K.B. 378.

M. Atwater, dans son argument, nous a dit que l'article 2584, C.C., s'appliquait non seulement au cas délictuel, mais aussi au cas où il y aurait responsabilité légale ou conventionelle de la part de celui qui aurait détruit la chose.

Je suis incapable d'accepter cette prétention.

L'article 2584 du Code Civil a été basé sur l'autorité de la doctrine maintenue par le Conseil Privé dans la cause de *Quebec Fire Assurance Co.* v. *Molson* (1), en 1851. C'est ce que déclarent formellement les codificateurs dans leur rapport.

Il s'agissait dans cette cause de l'incendie d'une église qui avait été causé par la faute de Molson et de St. Louis.

La compagnie d'assurance, ayant payé les propriétaires de l'église, a poursuivi les auteurs du délit, Molson et St. Louis, et le Conseil Privé, saisi de la cause, a décidé,

que les assureurs contre le feu ont le droit d'être subrogés aux droits et actions de l'assuré contre ceux qui ont causé le feu et la perte.

Les codificateurs ont inséré dans le Code l'article qui est devenu notre article 2584, qui se lit comme suit:—

L'assureur en payant l'indemnité a droit à la cession les droits de l'assuré contre ceux qui ont causé le feu ou la perte.

Si nous lisons littéralement cet article, nous en arriverons à la conclusion que l'assuré serait tenu de céder à l'assureur tous les droits qu'il possède contre les tiers, que ces droits résultent du délit de ces derniers ou qu'ils existent en vertu de la loi ou d'une convention. En d'autres termes, que l'obligation du tiers soit délictuelle ou simplement contrac-

(1) 1 L.C.R. 222.

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tuelle ou légale, l'assuré devait céder ses droits à l'assureur contre ce tiers.

La version anglaise cependant ne laisse pas de doute que la seule obligation du tiers qui passe à l'assureur est l'obligation délictuelle. Voici, en effet, le texte de l'article :—

The insurer on paying the loss is entitled to a transfer of the rights of the insured against the persons *by whose fault* the fire or loss was caused.

Les deux textes diffèrent évidemment. Alors nous devons pour les intérpréter, suivre la règle énoncée en l'article 2615, C.C., qui dit que nous devons suivre

le texte le plus compatible avec les dispositions des lois existantes.

Les codificateurs dans leur rapport se sont chargés de nous expliquer cet article.

Comme je viens de le dire, les codificateurs ont donné comme l'une des sources de cet article 2584 la décision du Conseil Privé dans la cause de *Quebec Fire Assurance Co.* v. *Molson et al.*(1). Or, cette cause consistait en un recours en dommages de l'assureur contre ceux qui par leur faute avaient incendié la propriété assurée et dans leur rapport les codificateurs disent formellement :—

Il semblerait que le droit de l'assureur qui paie est le droit d'obtenir de l'assuré une *cession de son recours en dommage.*

Les codificateurs citent aussi, à l'appui de leur rapport, Pardessus, Droit Commercial, paragraphe 595, qui nous dit qu'il arrive souvent que la perte dont l'assureur est obligé de faire la réparation est causé par le crime ou par la faute d'un tiers, alors dans ce cas l'assureur aurait toujours le droit de réquérir l'assuré de lui céder le droit d'action qu'il aurait contre l'auteur du délit (p. 143, 6ème édition) :—

(1) 1 L.C.R. 222.

Ce n'est point, il est vrai, le cas de subrogation légale; ce n'est pas même celui de la subrogation conventionelle; c'est le cas de la règle que nul ne peut se dispenser de réparer le tort qu'il a fait (art. 1382, C.N.).

Je pourrais aussi citer Dalloz, Répertoire Pratique, vo. "Assurance," No. 136, qui dit:—

Il est généralement admis que l'assureur a une action directe contre les tiers responsables du sinistre en vertu du principe général formulé par les articles 1382-1383. Cette action ne lui permet pas d'invoquer toutes les garanties spéciales dont jouit l'assuré.

Les articles 1382 et 1383 du Code Napoléon, qui correspondent à notre article 1053, n'ont trait qu'aux délits et non pas aux obligations résultant de la loi ou des conventions. Il est donc évident pour moi que les droits dont parle l'article 2584 du Code Civil ne sont que les droits de l'assuré contre les personnes *par la faute* desquelles la perte a été causée

Le texte anglais de cet article est donc celui qui répond à l'intention des codificateurs et qui énonce le plus correctement la loi alors existante.

Je pourrais citer à l'appui de cette opinion: Laverty, Insurance Law, pp. 458-459 et 460; Dalloz, 1853-1-93; Dalloz, 1882-2-238.

La compagnie d'assurance n'avait donc pas le droit dans les circonstances de se faire céder les droits que Madame Claveau, l'assurée, avait contre la Ville de Chicoutimi. Par contre, cette dernière est légalement devenue propriétaire de la créance de l'assurée contre la défenderesse appelante.

Je considère que la compagnie est tenue de payer et le jugement qui l'a condamnée doit être confirmé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Atwater, Duclos & Bond.*
Solicitor for the respondent: *L. Alain.*