complainant without prejudice to the business of the defendant. In the case of *Central Trust Co.* v. *Wabash, St. L. & P. Ry. Co.*, 29 Fed. Rep. 546, I considered at some length the power of a court of equity in case of a contract of this kind, and I have nothing to add to what I there said. I think a court has power to enforce a contract between parties of the same nature as those which we know, as a matter of general knowledge, railroad companies are constantly making and keeping. A decree will therefore be entered decreeing to complainant the right to use the track of the defendant from the northern limits of the city down as far as George alley; the balance of relief claimed by complainant will be denied; the costs will be divided.

KORTLANDER v. ELSTON.

(Circuit Court of Appeals, Sixth Circuit. October 10, 1892.)

No. 23.

1. GUARANTY—APPLICATION OF COLLATERAL—CONTRACT.
   A debt payable in installments was secured to its whole amount by insurance policies on certain buildings for the benefit of the creditor, and also by the guaranty of a third person for the part first due. *Held*, that the creditor had a right to hold the insurance money paid when the buildings were burned as security for the part of the debt not covered by the guaranty, although not yet due, and that the guarantor was liable for the unpaid installments covered by his guaranty. *English* v. *Carney*, 25 Mich. 183, distinguished.
2. SAME—RELEASE.
   Where a creditor whose debt is secured by fire insurance policies, and in part by a personal guaranty, accepts from the insurance companies an amount less than the face of the policies, the burden of proof is on the guarantor to show that the creditor got less than was due him, and thereby released the guarantor from his contract.
3. SALE—RETENTION OF TITLE—INSURANCE.
   Where a contract of sale of furniture provides that the title shall remain in the seller until the price is paid, and the furniture is insured for his benefit, and he pays the premium, he is entitled to all the insurance money coming from a loss, and the purchaser has no interest in it.
4. SAME.
   If the purchaser pays the premium, a charge to the jury that the seller has a right to apply so much of the insurance money as is necessary to pay the balance due on the furniture, and hold the surplus under the direction of the purchaser, to reduce the liability of the guarantor of another debt due from the purchaser to the seller, is not to the prejudice of the guarantor, nor, as to him, a ground for error.

In Error to the Circuit Court of the United States for the Western District of Michigan.

At Law. Action in *assumpsit* on a contract of guaranty by Robert W. Elston against Adolph H. Kortlander. Judgment for plaintiff. Defendant brings error. Affirmed.

Statement by TAFT, Circuit Judge:

Robert W. Elston, an alien, brought his action in *assumpsit* against Adolph H. Kortlander, a resident of Michigan, on a written contract of guaranty. Elston was the owner of an hotel and tract of land in Kent

county, Mich., which in June, 1890, he contracted to sell to one Edwin Carman for $12,000, to be paid: $200 on the delivery of the contract; $200 or more on the 27th day of each month, up to and including June 27, 1891; and the remainder in monthly payments of $300 on the 27th of each month thereafter, with interest at the rate of 7 per cent. per annum, to be paid semiannually from the date of the contract upon so much of the purchase money as remained unpaid. Carman agreed, among other things, to insure the buildings then erected and to be thereafter erected on said premises in companies to be approved by Elston, for Elston's benefit, in the sum of at least $6,000, so long as any balance should remain unpaid on the contract; and to forthwith deliver the policy or policies therefor to Elston; and, in case Carman failed to insure, Elston was given the right to do so, and to add the cost thereof to the amount due under the contract, with interest at 10 per cent. A deed was to be executed when $8,000 of the purchase money had been paid. Right of re-entry was reserved to Elston in case of default in any payment by Carman. Carman covenanted that all buildings, erections, and improvements then upon or thereafter to be placed upon the premises should stand as security for the payments of sums agreed to be paid by him, and should not be removed from the premises without the written consent of Elston.

Kortlander guarantied the payment of $3,000 of the purchase money, as follows:

"In consideration of the making by the said Robert W. Elston with the said Edwin Carman, at my request, of the foregoing agreement, and also for other good and valuable consideration, the receipt whereof is hereby confessed and acknowledged, I do hereby become security for the punctual payment of the three thousand dollars ($3,000) of principal first to be paid by the terms of the foregoing contract by the said Edwin Carman to the said Robert W. Elston, together with the interest thereon, at the time and in the manner expressed in said contract, and hereby guaranty the payment thereof as expressed in said contract, and, in default of payment by the said Edwin Carman, I do hereby promise and agree to and with the said Robert W. Elston to pay him said amount, with the interest thereon, without requiring notice or proof of demand being made.

"*Dated this 24th day of June*, 1890.

"A. H. KORTLANDER. [L. S.]

"In presence of CHARLES CHANDLER."

Carman already had possession of the premises under a lease from Elston, and now continued it under the contract. He had, in May, 1890, bought the hotel furniture from Elston for $1,500,—$388 in cash, and the rest to be paid in monthly installments, the last payable in May, 1891. The contract of purchase provided that the title to the chattels should remain in Elston until the purchase money was fully paid, but that Carman might use them, subject to Elston's right to repossess himself in case of default on any payment. Carman paid $588 in cash on the furniture contract. At the date of the contracts, Elston had three policies of fire insurance on the hotel and furniture,—one in the Citizens' Fire Insurance Company for $1,300 on buildings and $700 on the

furniture, the second in the Underwriters Company for $1,400 on the buildings and $600 on the furniture, and the third in the Royal Insurance Company for $1,300 on the buildings and $700 on the furniture. When Elston delivered the property to Carman, he took the policies to the office of the agent of the companies. He did not find the agent, but left the policies, with notice that he had sold the place on contract. The policies were returned to Elston, and by him put away without examination. The agent had indorsed upon the Citizens' and the Underwriters' policies a memorandum that the land and buildings insured had been sold on contract to Edwin Carman, to whom the loss, if any, was payable, as his interest might appear. Upon the Royal policy there was no indorsement.

On the 14th of August, 1890, all the buildings and a large part of the furniture were destroyed by fire. On August 16th, Carman assigned his interest in the two policies indorsed to him to Elston, at the request of Elston's attorney, Fitzgerald, with whom Elston had left the policies during his absence from home. Suit was begun on all three policies, and, pending suit, the claim was settled for $4,050 without reference to any division of the fund between the buildings and the personal property. This amount Elston kept, and on August 17, 1891, brought suit against Kortlander on the guaranty. The amount of money due on the land contract by its terms, up to and including July 27, 1891, was $3,000 and interest. Of this, Carman had paid $400, as Elston admitted, and he claimed to have paid $200 more. This made one issue of fact at the trial. Another controversy was as to the manner in which the insurance money should be applied. Kortlander claimed that Elston should credit it on the first amounts due under the contract, thus paying everything which he had guaranteed; and he introduced himself and Carman as witnesses to prove that, in consideration of Carman's assigning the policies, Elston agreed to apply the money so as to release Kortlander. Elston denied having made any such agreement, and this presented another issue of fact on the evidence. Finally, Kortlander claimed to be credited with the amount received by Elston as insurance on the personal property, on the ground that Carman, having paid Elston the premium when he bought the furniture, was entitled to apply the insurance as he wished, and had applied it to the land contract and the first payments thereunder. Elston denied that Carman had paid the premium on the personal property insurance, and this made a third issue of fact for the jury. Under the instructions of the court, the jury returned a verdict for Elston of $2,441.60. Upon this was entered the judgment which this writ of error was brought to reverse. Defendant's counsel requested several charges, which were refused, and excepted to a number of passages in the charge as given. The assignments of error, based on these rulings of the circuit court, are referred to in the opinion.

James E. McBride, *Lyman D. Norris*, and *Mark Norris*, for plaintiff in error.

Fitzgerald & Barry, for defendant in error.

Before BROWN, Circuit Justice, and JACKSON and TAFT, Circuit Judges.

TAFT, Circuit Judge, (*after stating the facts.*) The plaintiff in error has made 13 assignments of error. It will not be necessary to consider them in detail.

In the first place, it was contended on behalf of Kortlander that, as surety, he was entitled, under the terms of the original land contract and his written guaranty, to have one fourth of the proceeds of the insurance policies from the destruction of the buildings applied to the amount due on his guaranty. It was said that he had guaranteed the payment of $3,000 out of the $12,000 to be paid for the land, and as surety he had a right in equity to be protected by a *pro rata* distribution of the collateral over the whole debt. The court below refused a charge embodying this view of Kortlander's right to the insurance money, and told the jury that, unless there was a subsequent agreement changing the rights of the parties, Elston had the right to hold the insurance money realized on the buildings as security for the payment of the whole debt, exactly as he might have taken possession of the buildings for this purpose, and that Kortlander had no right in law or equity to demand that the money be applied to the amount due under the guaranty. In this we think the court was entirely right. The primary equity growing out of the relation of creditor, debtor, and surety is that the creditor be paid what is due him; and he does not lose this equity as against the surety, except by misconduct to the latter's prejudice. When the creditor in the original contract has received collateral covering the entire debt, and a personal guaranty on part of it, the legal and the natural presumption, in the absence of circumstances showing the contrary, is that he has taken the personal guaranty as additional or cumulative protection for his debt. In order that his debt may be paid, therefore, he has the right to exhaust all his securities, and in doing so he may apply the collaterals to that part of the debt not covered by the personal guaranty, and hold the guarantor to the full measure of his contract. The equity which a surety or a guarantor has in the collateral is merely the right, accruing only after the principal debt is fully paid, to be subrogated to the right of the creditor in respect of the collateral security. This, the surety may take from the paid creditor as security against loss by reason of his suretyship. Kortlander, therefore, could have no right to the insurance money for the buildings until Elston had been paid all the purchase price which the buildings and the insurance on them were intended to secure. Elston did not regard the land and buildings as sufficient security for the payment of so many small installments over so long a period, and he therefore demanded as additional protection Kortlander's personal guaranty of the payment of the first $3,000. It would seem absurd to require Elston to suffer loss by sharing the collateral with Kortlander for the purpose of reducing the latter's liability on a guaranty, the only object of which could have been to supplement the collateral and increase Elston's security.

The case of *English* v. *Carney*, 25 Mich. 183, cited for plaintiff in error, is not in conflict with this view. There a mortgage was given to secure two notes of even date. The payee and mortgagee sold the mort-

gage and notes to a third party, indorsing one note in blank, and the other without recourse. It was held on foreclosure that the proceeds of sale must be applied *pro rata* to both notes. The *pro rata* application of the security to the notes was fixed by the original contract when the mortgage was given, and a subsequent indorser, of course, made his indorsement on the basis of the amount of the security applicable to each note thereunder. In the case at bar, the guaranty and the collateral security were given concurrently, each with reference to the other, and no one can doubt the intention of the parties to the original contract, that the creditor should use and exhaust both, if necessary, to pay his whole debt. The authorities in support of our view are numerous. In *Hanson* v. *Manley*, 72 Iowa, 48, 33 N. W. Rep. 357, a chattel mortgage secured four notes. There was a surety upon the two notes first due. It was held that the proceeds of the mortgage might be applied by the creditor on the notes on which there was no surety. In *Nichols* v. *Knowles*, 3 *McCrary*, 477, 17 Fed. Rep. 494, Judge McCRARY decided that where a creditor held several notes secured by mortgage, one of which was also secured by the indorsement of a third party, it might be inferred, in the absence of evidence, that the parties intended to apply the proceeds of the sale of the mortgaged property first to the notes not otherwise secured, so as to give the creditor the full benefit of all his security. To the same effect are *Mathews* v. *Switzler*, 46 Mo. 301; *Wood* v. *Callaghan*, 61 Mich. 402, 28 N. W. Rep. 162, (where *English* v. *Carney*, *supra*, is distinguished;) *Gaston* v. *Barney*, 11 Ohio St. 506; *Bank* v. *Benedict*, 15 Conn. 437; *Field* v. *Holland*, 6 Cranch, 8; *Transportation, etc.*, *Co.* v. *Kilderhouse*, 87 N. Y. 430; *Bank* v. *Wood*, 71 N. Y. 405; *Gordon* v. *Bank*, 115 Mass. 591.

It is true that when the action below was brought the installments of rent not covered by the guaranty were not due, and that, except by agreement, Elston could not then apply the insurance money to those subsequent installments. His right was to hold the money as security until the installments came due, and then, if they were unpaid, to use the insurance money to pay them. But the question of the subsequent application of the insurance money is not material in this discussion, in view of the conclusion just reached, that the insurance money could not be applied to reduce Kortlander's liability on his guaranty, until after the rest of the purchase money was paid. As the entire purchase money was not due until long after that part covered by the guaranty, and not until long after the suit was brought, the insurance money could not, for the purposes of this suit, affect Kortlander's liability at all.

The second claim made on behalf of the plaintiff in error was that Elston, in adjusting the loss on the buildings with the insurance companies at less than the full amount of the policies, had released collateral without consent of Kortlander, and so had released the latter from his contract of suretyship. A policy of insurance is not like a promissory note, in which an exact amount is unconditionally payable. The face of the policy represents only that amount beyond which, as a limit, the claim of the insured cannot go. The amount due is the actual loss.

The burden of showing facts requiring his release is on the surety. There was no evidence tending to show that the amount recovered was not fully equal to the actual loss on the buildings. The presumption is therefore that Elston recovered all that he was entitled to under the policies, and did not release anything. The charge was rightfully refused.

The chief contention of counsel for the defendant below was that by a subsequent agreement Elston had stipulated with Carman, the debtor, and Kortlander to apply the insurance money on the contract so as to relieve Kortlander. Whether such an agreement was made, was fairly submitted to the jury as a question of fact, and the jury found against the defendant.

The consideration suggested for making the subsequent agreement on Elston's part was that Carman had assigned the two insurance policies, indorsed to him, back to Elston. If it were material, we should find difficulty in supporting the agreement on such a consideration. The indorsement on the policies to Carman was a palpable mistake of the insurance agent, without the knowledge of either Carman or Elston, was in direct violation of the provision as to the insurance in the original contract, and gave Carman no greater right than if the indorsement had never been made. It was his duty to reassign the policies to comply with his original contract, and his doing so could not constitute a valuable consideration moving to Elston. The error alleged on this branch of the case was the refusal of the court to give the following charge:

"If you find from the evidence that plaintiff agreed with Mr. Carman to apply the money received on insurance as payment on contract for the sale of the premises in question, then he is obliged to apply it as any other cash payment on the amounts due and unpaid."

The court had already instructed the jury that, if the parties had agreed to apply the money on the part of the contract covered by the guaranty, plaintiff could not recover, and that the same result would follow from an agreement that the application should be upon the payments due and as they fell due.

Considering all the evidence in the record, it seems to us that the charges which the court gave covered substantially all that was contained in the charge requested and refused. It does not appear, when the evidence is all taken together, that it raised any issue upon the point whether the parties agreed in so many words to apply the insurance money generally on the contract, as distinguished from agreeing to apply it on the payments due. The evidence of Carman and Kortlander was to the effect that Elston agreed to apply the insurance money on the amount then due under the contract, and that he distinctly agreed to release Kortlander. Elston denied this. The sharp issue thus presented was fairly submitted to the jury in the charges given.

Another objection to the charge of the court, and the last one we shall notice, was to the instruction relating to the application of the money realized from the insurance on the furniture. This insurance was in the name of Elston, and was, of course, payable to him. The title to the furniture under the contract was in him at the time of the fire. The

furniture contract contained no provision as to insurance. Elston testified that Carman refused to pay the insurance premium on the personal property, and that he paid it. Carman swore that he paid the premium on all the policies covering both the buildings and the furniture. This was all the evidence on the subject. The court charged the jury that, if Elston paid the premium, he was entitled to all the insurance money coming from the loss of the furniture, and that neither Carman nor Kortlander had any interest in it. In this the court was clearly right. The insurance and the property were both in his name, and, if he paid the premium, the matter was one with which Carman had nothing to do, and from which neither he nor Kortlander could derive any benefit. *Kingsbury* v. *Westfall*, 61 N. Y. 356. The court further charged the jury that, if Carman paid the premium, then Elston might apply so much of it as was necessary to pay the balance of purchase money on the furniture due him from Carman, and would hold the surplus for application, as directed by Carman, to reduce Kortlander's liability. We are quite clear that Kortlander has no ground of complaint in this charge. The court proceeded on the theory that, with the property and the insurance in Elston's name, the fact that Carman had paid the premium implied a contract on Elston's part to distribute the insurance, in case of loss, between himself and Carman, as their respective interests might appear. Whether, from these facts alone, such an implication would arise, we need not definitely determine. The transaction can certainly not be viewed in any more favorable light for the plaintiff in error, in the absence of a special contract. A strong argument might be made in support of the view that the insurance all belonged to Elston, and the fact of Carman's paying the insurance only gave him a right to be reimbursed the amount of the premium. As it is, we simply hold that the error, if any, was not to the prejudice of the plaintiff in error.

The foregoing discussion has covered all the mooted points in the record worthy of consideration, and the result is that the judgment of the circuit court must be affirmed.

INTERSTATE COMMERCE COMMISSION v. TEXAS & P. RY. CO.

(*Circuit Court, S. D. New York.* October 4, 1892.)

1. INTERSTATE COMMERCE COMMISSION—ENFORCEMENT OF ORDER—PARTIES.
In proceedings under section 16 of the interstate commerce act (24 St. at Large, p. 384) against a carrier to enforce an order of the commissioners, it is not necessary that another carrier, making the forbidden rate jointly with defendant, be made a party to the suit.

2. SAME—UNJUST DISCRIMINATION—COMPETITIVE TRAFFIC.
Freight rates from London and Liverpool to San Francisco are fixed by the competition of the water and rail route via the Isthmus of Panama and the water route around Cape Horn. A carrier by rail from New Orleans to San Francisco gave a much lower rate on goods shipped from London and Liverpool to San Francisco on through bills of lading than from New York, Chicago, and other points to San Francisco, (in some cases less than half the latter rate.) The rate complained of was slightly remunerative to the carrier, and it would lose the traffic unless it carried at such low rate. *Held*, that under sections 2 and 3 of the interstate commerce act (24 St. at Large, pp. 379, 380) the giving of such low rate is an unjust discrimination, and a charging of one person more than another for a like service under substantially similar circumstances and conditions, and an order of the commissioners prohibiting it will be enforced.

Application by the Interstate Commerce Commission to enforce an order against the Texas & Pacific Railway Company. Petition granted.

Edward Mitchell, (*Simon Sterne* and *John D. Kernan*, of counsel,) for complainant.

Winslow S. Pierce, (*John F. Dillon*, of counsel,) for defendant.

WALLACE, Circuit Judge. This is an application to enforce an order of the interstate commerce commission, made January 29, 1891, in a proceeding instituted by the New York Board of Trade & Transportation. The petition in that proceeding complained of unjust discrimination made by various railway carriers. The defendant was duly notified of the complaint, and appeared in the proceeding, and submitted its rights. It was shown to the commission, as appears by the findings of fact in their report, that the defendant, in conjunction with the Southern Pacific Company, made joint rates from New Orleans to San Francisco covering carriage of traffic by the rails of the defendant from New Orleans to El Paso, and thence by the rails of the Southern Pacific Company to San Francisco, and also made joint rates with vessel owners in London and Liverpool covering carriage of traffic from those places to San Francisco via New Orleans. It was also shown that the ordinary tariff rates charged by the two companies upon traffic delivered to the defendant at New Orleans, and shipped at New York, Chicago, and other places in this country, for carriage from New Orleans to San Francisco, were somewhat more than double the rates charged for carriage of similar traffic sent from Liverpool or London by through bill of lading to San Francisco via New Orleans. To illustrate, it was shown that the rates made by the two companies, in conjunction with Liverpool vessel owners, by through bill of lading from Liverpool to San Francisco via the rails of the defendant from New Orleans to El Paso, were, per 100 pounds, on books, on carpets, and on cutlery, $1.07,