3 Johns.Cas. 224
Supreme Court of New York.

LENOX
v.
THE UNITED INSURANCE COMPANY.

October Term, 1802.

***224** A policy of insurance on goods, contained a clause, that the loss was to be paid "*thirty days after proof thereof.*" The property having been captured, the insured abandoned, and as proof of the loss and interest, laid before the insurers the *protest* of the master, in the usual form, stating the loss, and the bill of lading and invoice. This was held to be sufficient preliminary proof, within the meaning of the policy, to entitle the plaintiff to bring his action after the expiration of the thirty days.

Strict *technical* proof, or the *oath* of the party or of witnesses, is not requisite, in such case.

THIS was an action on a policy of insurance, dated the 13th *March,* 1800, on three boxes of muslins, on board of the vessel called the *Rambler,* at and from *New-York* to *Monte Christe,* &c. The goods were valued at 2,610 dollars, the sum insured. The vessel was captured by the *French,* during the voyage, and the plaintiff abandoned for a total loss. By the policy, the loss was made payable ""thirty days after proof thereof." The plaintiff, at the time he abandoned and claimed a total loss, exhibited to the defendants the customary *protest* of the master, stating the loss, and the bill of lading and invoice of the goods. The two latter were not sworn to, and the defendants refused to admit the invoice, without the oath of the plaintiff, which he declined to give, as not requisite on his part.

At the trial, the *interest, loss* and *abandonment* were fully proved by the plaintiff, and the jury found a verdict for the plaintiff, for a total loss.

A motion was made to set aside the verdict, and for a new trial.

Attorneys and Law Firms

Hamilton, for the plaintiff.

Harison and *Troup,* contra.

Opinion

THOMPSON, J.

The true question arising out of the above case, and which is submitted to the decision of the court, appears to be, to determine what is the construction to be given to that part of the policy which declares, "*that the loss is made payable in thirty days after proof thereof.*" On the part of the defendant it is contended, that proof of loss is a condition precedent; that the plaintiff commenced his action prematurely, without producing ***225** to the underwriters the kind of proof contemplated by the policy; that the proof previously necessary to be exhibited, must be proof of interest as well as loss, and that by witnesses, or at least by the oath of the party himself. In the present case, no such proof was offered before the commencement of the plaintiff's action. The evidence of loss and interest exhibited to the defendants, consisted of the customary protest, and the bill of lading, and invoice of the muslins; but the bill of lading was not sworn to. On the part of the plaintiffs, it is contended, that these were all that were necessary to be offered, in order to satisfy the terms of the contract.

It is a governing rule, in expounding policies of insurance, as well as other contracts, that the intent of the parties ought to be sought after and carried into effect, where it can be discovered from the instrument itself. *Proof,* in strict legal construction, means evidence before a court or jury, in a judicial way. It is certain, however, that such could not have been the understanding of the parties to this contract, as to the meaning of the term. And it was not contended by the defendants' counsel that such kind of proof was contemplated; but that proof collateral, and out of court, would satisfy the terms of the contract; that this proof must be either by witnesses, or by the affidavit of the plaintiff.

The parties to a contract have undoubtedly a right to modify it as they think proper, and to impose on each other such restrictions as they shall choose, if not illegal. So that, if it was clearly inferrible from the instrument, that it was the intent of the parties, that before the loss was payable, proof by witnesses, or by the oath of the party, of both loss and interest, must be exhibited to the underwriters, the contract ought to be so construed as to carry that intention into effect. But I think the terms do not necessarily warrant such an inference, and all rational presumption is against such conclusion. It is not fairly to be presumed that the plaintiff would lay himself under ***226** restrictions that might totally prevent a recovery in case of a loss; and such might be his situation in case it

was necessary for him to produce proof by witnesses, of his interest and loss, before he could bring his action, as no mode is provided in the law to compel witnesses to appear before any officer or magistrate to attest to such facts. Although it was in the power of the plaintiff, by his own affidavit, to attest to his interest, yet, in my judgment, that ought not to be required, unless it was essential, in order to satisfy the terms of the contract. And although I do not think it necessary, for the purpose of deciding the present question, to determine how far voluntary oaths ought to be tolerated, yet I do not hesitate to say, they ought, very rarely, if ever, to be administered.

It is a circumstance worthy of notice, that by this policy, the loss is made payable in thirty days after proof of *loss* only, and not after proof of *loss* and *interest,* and although on the trial, it is incumbent on the insured to prove his interest as well as loss, yet he would be bound to do this, independent of this clause in the policy. This is a clause peculiar to our own policies, and I cannot think it ought to receive a construction that will impose on the insured the necessity of producing the same proof preliminarily, that would be requisite on the trial, to entitle him to recover. Admitting, therefore, that proof necessarily implies evidence under oath, still, as to *loss,* (which is all that is expressly required by the policy,) the protest of the captain furnishes that species of proof. It was stated in argument, by the plaintiff's counsel, and not denied by the defendants, that policies had lately undergone an alteration in this clause. That formerly, the loss was made payable in so many days after proof of *loss* and *interest;* but that lately, the word interest had been expunged. Taking this, then, as a fact, it would afford a strong inference, that it was the intention of the parties to dispense with any proof of *interest,* as a ***227** preliminary step under this clause; at all events, that nothing more should be required than the usual documents, to wit, the *invoice* and *bill of lading.* The interest of commerce, as well as the convenience of parties, demands this construction, unless forbidden by the terms of the contract, and more especially, as the clause is peculiar to our own policies. One of the principal objects of this clause, no doubt, was, to give the underwriters time to determine, after being apprized of the loss, whether they would pay without a suit; and for the purpose of furnishing them with evidence on which to ground their determination, they ought to have offered what may afford them a reasonable satisfaction, according to the course of mercantile business. I am, therefore, of opinion, that the documentary proof, to wit, the protest, bill of lading, and invoice of the goods insured, were all the preliminary proofs necessary for the plaintiff to exhibit to the underwriters, previous to his bringing his action, according to the legal import and true intent and meaning of this clause in the policy; and more especially, in the present case, as it is stated, that the plaintiff's *interest* and *loss* were fully proved on the trial, and the only possible benefit resulting to the defendants from the contrary construction, would be to turn the plaintiff round to bring a new suit. This consideration ought not, however, to influence the decision, if it was clearly made necessary by the contract, that the preliminary proof should be different from that offered. But as I do not think that requisite, I am of opinion, the verdict ought not to be set aside.

RADCLIFF, J.

The question is, whether by the terms of the policy, the plaintiff was obliged to make oath of his interest in the cargo, before he was entitled to demand payment of the defendants. The proof required on this occasion was the plaintiff's own oath, and not proof by *witnesses,* or any other species of evidence. Proof in ***228** general, in a legal sense, means proof *by witnesses,* and if it be contended that the defendants had a right, in this instance, to demand legal proof of the loss, thirty days before bringing the action, that proof ought to have been by witnesses, or, at least, by some evidence which would be admitted in a court of justice, and not proof by the oath of the party. The contract itself does not require the oath of the party, and without such a provision in the contract, the policy of the common law will certainly not tolerate the principle that one party may impose on another the necessity of swearing to his right of action, before he shall be entitled to recover. It is not competent to any one thus to judge his adversary upon oath. A party to a suit is not even bound to disclose the particular grounds of his action, or any fact of his defence, either directly or collaterally, except when he comes to ask a favour, and his conduct is liable to suspicion, as on putting off a trial to an unusual period. If it could on any principle be allowed, I think the party demanding it ought to be concluded by it, and not be permitted thus to entrap his adversary, by professing a reliance on his veracity, and afterwards disputing it. If, therefore, the terms of the policy admit of any other interpretation, we ought to adopt it, and, I think, they evidently admit of a different and more rational construction. The expression is general, “thirty days after proof of loss.” It must be taken in connection with the subject matter, and according to the usual course of such proceedings. The loss itself is usually proved by the protest of the captain, and this, as far as it goes, is proof upon oath, and thus far the expression “proof of loss” may be technically proper; and I believe that thus far only was proof upon oath originally contemplated. As far as proof of *interest* may be required, independent of the captain's protest, I think it can only be

construed to mean the usual documentary proofs attending the subject, the bill of lading, invoice and other papers, if there be any. ***229** These satisfy the terms of the expression, granting that proof of loss also implies proof of interest, which may admit of some question. The parties in this case could not mean legal proof which can only be taken in a course of legal proceeding. They plainly referred to a different mode of proof, before the commencement of any legal process; and I think could only have contemplated the production of that species of evidence which would satisfy a reasonable mind. They must have had in view the existing laws of the country to govern their contract; and could not mean that an extrajudicial mode of inquiry should be instituted to obtain a new species of proof. Such a proceeding is unknown to the law, and wholly unauthorized. There is no tribunal before which such proof could be made, and no one authorized to examine or decide upon it. Indeed, I am strongly inclined to think that no magistrate has authority to take the proof required by the defendants. Mr. Justice *Blackstone,* in his *Commentaries,* says, that it is much to be questioned how far any magistrate is justifiable in taking a voluntary affidavit, in any extrajudicial matter; and we ought not to give a construction to this contract which would require a proceeding altogether novel, and in itself improper.

The cases which have been cited on the argument are extremely loose, and have established no certain rule on the subject. In the case of *Tedcastle v. Hollwell,* (*Cro. Eliz.* 236.) the defendant covenanted to pay in one month after notice of the goods which might be embezzled by an apprentice, the same (the embezzlement) being *sufficiently proved. Gawdy* and *Fenner,* two of the justices, conceived the proof ought to be before action brought by some *collateral means,* but in what manner, or by what means, they did not say, and the case was decided on a different ground.

In *Gold v. Death,* (*Cro. Jac.* 381. *Hob.* 92. 1 *Lutw.* 665. 3 *Bulst.* 55.) the covenant was to pay in three months ***230** after due proof thereof made by the *confession* of the apprentice, or *otherwise howsoever,* and notice thereof given. The court resolved that the proof intended was proof before action brought, which could not be by trial, but ought to be *in such manner as it may;* and if made to the defendant, they said it ought to be only by witnesses who will *affirm it before him;* and if to be made to *J. S.* (a third person) by witnesses *produced before him;* and *Dodderidge,* J. added, that the proof referred to, being the confession of the party, it was suffi??nt if he confessed it *under his hand.* The expressions, confession *under his hand,* witnesses *produced before him, or who will affirm it before him,* in the sense there used, do not imply proof upon oath; and that case was decided on the ground of the party having confessed it under his hand, which was held sufficient.

In *Cockaine v. Goodlage,* (1 *Bulst.* 40.) where the condition of a bond was to pay in three months after demand, and due proof made of embezzlement by an apprentice, the court held that proof was necessary to be made three months before the suit was brought, and that it might have been proved by an *account* stating the arrearages, &c.

The case of *Lee v. Fydge,* (*Cro. Jac.* 488.) turned on a defect in the plea, and, at most, decided only that the mode of proof ought to have been set forth.

In *Tracy v. Cheshue,* (2 *Keb.* 239.) the condition was to pay by a certain day, all such sums of money as should *appear to be due.* The court decided that by proof generally, is meant proof to a jury, and that there was no difference between a condition to pay what *is due* and what shall *appear to be due.* In that case *Twisden,* J. at first dissented, saying that proof by such a day cannot be by jury, and, therefore, may be by *note, affidavit* or *otherwise,* but he afterwards agreed with the rest of the court, on the general ground. There is nothing in that case in any way applicable to the one before us, but the *dictum* of Justice *Twisden,* the result of his first impression, ***231** and which he afterwards relinquished as foreign from the point decided.

In *Crockhay v. Woodward,* (*Hob.* 217.) the court agreed, that where *the form of proof* was appointed by the parties, that should prevail, as in *Gold's Case* above mentioned; as if it were to be made by certificate in writing, or by witnesses before two aldermen, or the like, which proof could not be judicial.

The case of *Abel v. Potts* (3 *Esp.* 242.) related to the competency of the proof of interest *at the trial.* In the case of *Camberling v. M'Call,* (2 *Dallas,* 280.) there was no sort of proof offered before the action was commenced.

None of these cases apply to the present, unless it be that of *Crockhay v. Woodward,* in which the court agreed to the general principle, that the form of proof appointed by the parties should prevail; as if it were appointed to be made by certificate, or by *witnesses before two aldermen,* or the like. It is a sufficient answer to say that in the case before us, the form of proof was not prescribed, and that the expression is after "*proof of loss*" generally. But for the reasons already given, I should not be inclined to subscribe to the correctness or authority of that case, in relation to the supposed proof by witnesses before two aldermen. That mode of proof appears

to have been mentioned merely incidentally by the court, in reasoning on the subject, and was not distinctly considered.

Upon the whole, I am of opinion, that there is no adjudged case which is decisive of the question before us, and that on principle and reason, and according to the usual course of such proceedings, the proof offered by the plaintiff was sufficient.

KENT, J.

The only question raised in this case is, whether the plaintiff produced to the defendants proof ***232** of loss, before bringing his suit, sufficient to entitle him to recover?

The plaintiff exhibited the protest, bill of lading and invoice. This species of proof has been aptly termed documentary evidence. The interest of the assured may be proved by such documents. The bill of lading is always received as a document of the goods laden on board, and in the present case, the authenticity of the hand-writing of the master was not questioned. The protest is, in mercantile understanding, high evidence of loss; and it may well have been intended by the parties, since the strict proof requisite on a trial was surely never within their contemplation. As long as the words of the policy can be satisfied, by furnishing the papers that were produced, we ought not to extend them so far as to include proof by the oath of witnesses, or the oath of the party, which seems to have been required in the present case. The law will not sanction an oath administered, at the instance of an individual, when there is not a *lis pendens,* unless there be a positive provision for the case. Many difficulties would arise under the construction, that the parties intended proof by witnesses. These difficulties are avoided by confining the words to the vouchers respecting the property on board, and as to the loss; and such vouchers are to be furnished to the insurer, not in the light of proof, technically considered, but as reasonable information or notice, upon which he is to act.

Something analogous to this was the case of *Abel v. Potts,* (3 *Esp. Cases,* 242.) in which there was a memorandum in the policy, that the loss was to be adjusted within three months after advice of the loss. These words were liberally construed to mean not exclusively a direct notice from the insured; but the entry of the capture in *Lloyd's* books, with presumptive evidence that the insurers must have seen them, was held sufficient.

***233** It is, perhaps, unnecessary to examine the cases which were cited to show that a stipulation of the parties, that proof by witnesses or the oath of the party should be furnished, would be a valid stipulation, because, for the reasons already given, the words in the present case can be sufficiently answered, without resorting to proof beyond the documents that were furnished. My present impression is against the validity of a stipulation, that a party shall not be entitled to sue and recover, on a just demand, until he shall have furnished the opposite party with proof, by the oath of himself or of witnesses; and it appears to me, on examination, that none of the cases afford us a direct judicial decision to that effect. (See *Tedcastle v. Holloway, Cro. Eliz.* 236. *Gold v. Death, Hob.* 92. *Cro. Jac.* 381. 3 *Bulst.* 54. S. C. *Year Book,* 10 *Edw.* IV. *pl.* 11. *a dictum of two judges. Palm.* 166. 1 *Bulst.* 40. *Cockaine v. Goodlage,* 2 *Dall.* 282.) None of them go further than *dicta,* or collateral sayings, and none define the mode or manner of the proof. I wish, however, to be understood as not giving any definitive opinion upon that point, as it is sufficient to say that, in the present instance, the requisite proof was produced.

I am of opinion, accordingly, that the plaintiff is entitled to judgment.

LIVINGSTON, J. dissented.

LEWIS, Ch. J. not having heard the argument, gave no opinion.

Judgment for the plaintiff. [a]

All Citations

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Footnotes

a See *Talcot v. Marine Insurance Company,* (2 *Johns. Rep.* 130.) *Haff v. Marine Insurance Company,* (4 *Johns. Rep.* 132.) *Johnston v. Columbian Insurance Company,* (7 *Johns. Rep.* 315.) *Barker v. Phœnix Insurance Company,* (8 *Johns. Rep.* 307. 317, 318.)

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