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 * Oct. 29.
 * Nov. 7.
 1936
 {
 * May 27.

HIS MAJESTY THE KING (PLAINTIFF) . . APPELLANT;

AND

THE SHIP *EMMA K*, HER GOODS,
 BOATS, TACKLE, RIGGING, APPAREL, FUR-
 NITURE, STORES AND CARGO, AND JOHN
 BARRETT (DEFENDANTS) } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH
 COLUMBIA ADMIRALTY DISTRICT

Evidence—Shipping—Crown claiming forfeiture of ship, under s. 67 (2) of Merchant Shipping Act, 1894 (Imp.), because of alleged false statement of citizenship in declaration of ownership—Authenticated photostatic copy of certificate of naturalization in foreign country to person of same name as person making declaration of ownership—Inadmissibility of comparison of handwriting of citizen's signature on said copy of certificate of naturalization with that of signature on declaration of ownership, to prove identity—Failure to object to admissibility at trial.

The Crown claimed forfeiture of a ship, under s. 67 (2) of the *Merchant Shipping Act, 1894*, (Imp.), alleging that its registered owner, one Manuel Purdy, wilfully made a false declaration touching his qualification to be registered as owner, by falsely declaring that he was a British subject. The declaration in question was contained in his declaration of ownership upon his application for registration of the ship in his name as owner, in March, 1933. His signature to this was duly proved. There was also put in evidence an authenticated photostatic copy of a naturalization certificate issued on November 27, 1926, by which "Manuel Purdy," "who previous to his naturalization was a subject of England," became a citizen of the United States. The signature "Manuel Purdy" appeared on this certificate, and evidence was given of the practice to have the signature of the person to whom the certificate relates put upon it. The Crown relied on a comparison of the handwriting of this signature with that of the signature to the said declaration of ownership, along with the identity of names, to prove identity.

Held: Such a comparison of handwriting was inadmissible. The authenticated copy of the naturalization certificate was good evidence of the contents of the original document; and the proper inference was that the signature "Manuel Purdy" appearing on the certificate was that of the person to whom the certificate was granted. But the rules by which, at common law or by statute, a record may be proved by exemplification or by the certificate of the person having the custody of the record, where in the nature of things the original cannot be produced, do not contemplate the use of such document for the purpose of establishing the character of the handwriting on the original document. The court cannot receive for the purpose of comparison of handwriting a copy, photographic or other, of alleged specimens of handwriting upon proof by official certificate alone. The court could

* PRESENT AT HEARING:—Duff C.J. and Rinfret, Lamont, Davis and Kerwin JJ. Lamont J. died before delivery of judgment.

not examine the photostatic copy of the certificate of naturalization in question for any other purpose than that of ascertaining the contents of the original. It was not shewn, therefore, that the Manuel Purdy who in 1926 was admitted a citizen of the United States was the same person who in 1933 made the said declaration of ownership and became registered as owner of the ship. Identity of names alone was not satisfactory evidence upon which to decree a forfeiture (which postulates an offence) under said s. 67 (2).

1936
 THE KING
 v.
 THE SHIP
 "EMMA K"
 ET AL.

The contention that, as the above particular objection to the comparison of handwriting to shew identity was not taken when the evidence was offered and received, effect should not be given to it now, was rejected (*Jacker v. International Cable Co.*, 5 T.L.R. 13). Nothing occurred at the trial (such as did occur, e.g., in *Bradshaw v. Widdrington*; see 86 L.T. 726, at 732) which precluded insistence on the objection now. Also, the document being admissible to establish a necessary part of the Crown's case, and having been admitted, it was not so much a question of the admissibility of a piece of evidence as of the manner in which evidence admissible and admitted could properly be applied. The denial of admissibility of such comparison was a proposition of law to which the court could not refuse to give effect on this appeal; because the Crown by this appeal was asking the court to declare a forfeiture, and the court must consider whether there was a proper foundation in the evidence for such a declaration.

Judgment of Martin, D.J. Adm., [1936] Ex. C.R. 92, in favour of an unregistered transferee of a registered mortgage of the ship, as against the Crown, affirmed in the result.

APPEAL by the Crown from the judgment of the Honourable Mr. Justice Martin, District Judge in Admiralty for the British Columbia Admiralty District (1).

The Crown claimed forfeiture of the ship *Emma K* by reason of an alleged false declaration in a declaration of ownership made on March 23, 1933. At the trial the present respondent Barrett was given leave to intervene as being a person interested as the unregistered transferee of a registered mortgage, and judgment was given in his favour (1) for the sum standing in court to the credit of the cause as the balance of the proceeds of sale of the ship, to be applied in reduction of the mortgage. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

F. P. Varcoe K.C. for the appellant.

D. K. MacTavish for the respondent Barrett.

The judgment of Duff C.J. and Rinfret, Davis and Kerwin JJ.* was delivered by

(1) [1936] Ex. C.R. 92; 50 B.C. Rep. 97; [1935] 3 D.L.R. 673.

*Lamont J., who, with the Judges here mentioned, sat at the hearing, died before the delivery of judgment.

1936
 THE KING
 v.
 THE SHIP
 "EMMA K"
 ET AL.

DUFF C.J.—This is an appeal from the judgment of Mr. Justice Martin (1), the local Judge in Admiralty for the Admiralty District of British Columbia, who, in proceedings taken under section 76 of the *Merchant Shipping Act* charging an offence under section 67 (2) of the same Act, adjudged the ship forfeited, but held that the sum of \$2,689.34 standing in court, a balance of the proceeds of the sale of the ship, should be paid out to John Barrett, intervener, who claimed as mortgagee. The learned judge held that forfeiture under section 67 (2) does not operate until condemnation and that the interest of the mortgagee was not affected by it.

In the view I take, it will be unnecessary to consider the point discussed in the very able judgment of the learned judge in admiralty.

Prior to the 22nd of March, 1933, the ship *Emma K* was registered in the name of Edward Lipsett Limited. By virtue of a bill of sale dated on that day it was sold to one Manuel Purdy who became the registered owner on or about that date. On the 18th day of April, 1934, an action was instituted by certain seamen for wages. In that action the ship was arrested and, on the 12th of June, 1934, was sold pursuant to a judgment in admiralty to satisfy the wage claims and costs of the crew. The Judge in Admiralty directed that the balance of the monies in court, after payment of these claims, should remain in court to the credit of any actions that were pending on the date of the order, and these included the present action. At the trial of the action, Barrett obtained leave to intervene as defendant as the unregistered transferee of a mortgage in favour of one Allender, dated the 23rd of March, 1933. The claim of forfeiture is in the endorsement on the writ stated in the following words:

The plaintiff's claim against the defendant ship is for the confiscation thereof to the purposes of His Majesty the King for that the registered owner thereof, one Manuel Purdy, did wilfully make a false declaration touching his qualification to be registered as such owner by falsely declaring that he was a British subject, whereas in truth and in fact he is and at all material times has been a citizen of the United States of America, contrary to Section 67, Subsection (2) of the "Merchant Shipping Act, 1894."

Alternatively the plaintiff says that being a citizen of a foreign country the said Manuel Purdy did unlawfully cause the ship *Emma K*

(1) [1936] Ex. C.R. 92; 50 B.C. Rep. 97; [1935] 3 D.L.R. 673.

to fly the British flag and assume a British character contrary to Section 69 of the "Merchant Shipping Act, 1894."

The learned judge found that the alternative claim was not established; and we agree with his views upon this branch of the case.

In support of the principal claim, the declaration of ownership made upon the application of Manuel Purdy for registration of the ship in his name as owner was produced from the Victoria registry and the signature of Manuel Purdy was proved by one of the employees in the registry who said that the document was signed in his presence. The declaration contains this statement:

I am a natural-born British subject, born at White Bay, Newfoundland, * * * and have never taken the oath of allegiance to any foreign sovereign or state, or have otherwise become a citizen or subject of a foreign state.

The claim for forfeiture is based upon the allegation that this statement is false and that the declaration was a "wilfully * * * false declaration" within the meaning of section 67 (2) of the *Merchant Shipping Act* which provides:

(2) If any person wilfully makes a false declaration touching the qualification of himself or of any other person or of any corporation to own a British ship or any share therein, he shall for each offence be guilty of a misdemeanor, and that ship or share shall be subject to forfeiture under this Act, to the extent of the interest therein of the declarant, and also, unless it is proved that the declaration was made without authority, of any person or corporation on behalf of whom the declaration is made.

Section 1 of the *Merchant Shipping Act* enacts that a natural born British subject who has become a citizen or subject of a foreign state shall not be qualified to be the owner of a British ship, subject to a qualification not presently material; and, consequently, the statement quoted from the declaration was obviously a statement "touching the qualification of" the declarant to be the owner of a British ship.

Evidence was adduced to show—to this evidence I shall particularly refer in a moment—that Manuel Purdy had, on the 27th of November, 1926, been admitted a citizen of the United States of America pursuant to law. Obviously, if the Manuel Purdy who became the registered owner of the *Emma K*, and, for the purpose of becoming registered as owner, signed and made the declaration of ownership above mentioned, was the Manuel Purdy who was admitted as an American citizen in 1926, he was not

1936

THE KING
v.
THE SHIP
"EMMA K"
ET AL.

Duff C.J.

1936
 THE KING
 v.
 THE SHIP
 "EMMA K"
 ET AL.
 Duff C.J.

qualified to be the owner of a British ship and the statement quoted from the declaration of ownership was contrary to the fact.

The claim for forfeiture necessarily rests upon proof by the Crown that, in making this statement, Manuel Purdy "wilfully made a false declaration" touching the qualification of himself to own a British ship. The point to be considered is whether or not the Manuel Purdy who, in 1926, was admitted a citizen of the United States was the same Manuel Purdy who made the declaration of ownership in 1933, and became registered as owner of the ship in 1933. Two circumstances are relied upon: first, identity of names, and second, identity of handwriting.

For the purpose of establishing this identity, a photostatic copy of the naturalization certificate issued to Manuel Purdy on the 27th November, 1926, is produced, and that copy is authenticated, first of all by the seal of the United States Court of Alaska, Division No. 1, attested by the Clerk of that Court; and, secondly, by the certificate of the Acting Deputy Commissioner of Labor under the seal of the Department of Labor of the United States of America, which seal in turn is attested by the certificate of the Acting Secretary of State for the United States of America and the Chief Clerk of the Department of State. The certificate of naturalization is as follows:

UNITED STATES OF AMERICA

No. 2303964

CERTIFICATE OF (Coat of Arms) NATURALIZATION

Petition, Volume VIII, Number 992-J.

Description of holder: Age, 33 years; height, 6 feet $\frac{1}{2}$ inch; color, white; complexion, fair; color of eyes, hazel; color of hair, dark brown; visible distinguishing marks, none.

(Note:—After September 22, 1922, husband's naturalization does not make wife a citizen.)

United States of America
 Territory of Alaska.

ss. Manuel Purdy
 Signature of Holder.

Be it remembered, that Manuel Purdy, then residing at number Street, City of Juneau, Territory of Alaska, who previous to his naturalization was a subject of England, having applied to be admitted a citizen of the United States of America pursuant to law, and at a regular term of the U.S. Court of Alaska, Div. No. 1, held at Juneau, on the 27th day of November, in the year of our Lord nineteen hundred and twenty-six, the court having found that the petitioner intends to reside per-

manently in the United States, and that he had in all respects complied with the Naturalization Laws of the United States, and that he was entitled to be so admitted, it was thereupon ordered by the said court that he be admitted as a citizen of the United States of America.

IN TESTIMONY WHEREOF the seal of said court is hereunto affixed on the 27th day of November, in the year of our Lord nineteen hundred and twenty-six, and of our Independence the one hundred and fifty-first.

JOHN H. DUNN, Clerk

U.S. District Court, Div. No. 1.

By 'Alta C. Purpus,'

Deputy (Official character of attestor)

(Seal)

1936
 THE KING
 v.
 THE SHIP
 "EMMA K"
 ET AL.
 Duff C.J.

The evidence sufficiently proves that one Manuel Purdy became a citizen of the United States by naturalization on the date mentioned. Evidence was also given to the effect that the practice is that the signature of the person to whom the certificate of naturalization relates shall be put upon the certificate; and the proper inference is that the signature "Manuel Purdy" appearing on the certificate is the signature of the Manuel Purdy to whom the certificate was granted. The Crown relies upon a comparison of the handwriting of this signature with the handwriting of the signature of Manuel Purdy attached to the declaration of ownership. The question is: Is such a comparison of handwriting admissible?

Section 8 of the *Canada Evidence Act* is in these words:

8. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

There is high authority to the effect that comparison under the statutory rule involves the production of both the disputed and the genuine handwriting. In *McCullough v. Munn* (1) the view of Palles C.B., that a photographic copy of the alleged genuine handwriting was not admissible for the purpose of comparison under the rule, was accepted by virtually all the Irish judges including Fitzgibbon L.J. and Holmes L.J. Whether or not that principle is applicable in this case it is not necessary to decide.

The certificate of naturalization was pertinent evidence to establish the offence charged under section 67 (2) and, probably, if the original document had been before the court, it would have been competent to the court, without the aid of the statutory rule, to enter upon a comparison

(1) [1908] 2 Ir. Rep. 194.

1936
 THE KING
 v.
 THE SHIP
 "EMMA K"
 ET AL.
 Duff C.J.

of the handwriting in the two signatures for the purpose of dealing with the question of identity. It is unnecessary to decide the question whether, if a photographic copy, proved in the ordinary way by the evidence of the photographer who had made the photograph and could inform the court upon the preliminary question as to the accuracy of his methods and results, had been before the court, it would have been competent to the court to inspect the copy of the signature so proved for the purpose of comparison with the signature attached to the declaration of ownership. What we have before us is something entirely different. It is a certified copy, or, if you will, an exemplification of proceedings in the United States Court in Alaska. This document is perfectly good evidence of the contents of the original document; but the rules by which at common law or by statute a record may be proved by exemplification or by the certificate of the person having the custody of the record, where in the nature of things the original cannot be produced, do not contemplate the use of such document for the purpose of establishing the character of the handwriting on the original document. I know of no principle and of no authority which could justify a court in receiving for the purpose of comparison of handwriting a copy, photographic or other, of alleged specimens of handwriting upon proof by official certificate alone. In my opinion, it is not competent for the court to examine the photostatic copy of the certificate of naturalization now before us for any other purpose than that of ascertaining the contents of the original certificate.

As evidence of identity there remains the identity of names which, in my opinion, is not satisfactory evidence upon which to decree a forfeiture (which postulates an offence) under section 67 (2).

The Crown argues that, as this particular objection to the evidence was not presented when the evidence was offered and received, effect cannot be given to it now. This argument is answered by *Jacker v. International Cable Company* (1), a decision which has been applied in this court more than once. There may, of course, be cases in which the failure to take an objection precludes the party from insisting on that objection on appeal, for example,

(1) (1888) 5 T.L.R. 13.

if, by reason of the fact that evidence was not objected to, the party refrains from offering other evidence which he has at his command which would be unobjectionable, the right to object to the evidence received may be lost. An instance of that occurred in *Bradshaw v. Widdrington* (1) where, as stated in the judgment of the Master of the Rolls, * * * it seems to me that Mr. Terrell is really not in a position to contest before us, as a matter of strict law, whether those accounts are admissible or not, because at the trial Mr. Astbury was there with the evidence which would have told us the precise conditions under which those accounts came into existence. Owing to what passed at the time between him and Mr. Terrell in the presence of the judge in the court below, that evidence was not called. * * * If those objections had been pressed, Mr. Astbury had witnesses who were prepared to deal with them.

Nothing occurred at the trial in the present case which precludes the respondent from insisting on the objection now.

It should be observed, however, that the document, the photostatic copy of the certificate of naturalization, was plainly admissible for the purpose of establishing a necessary part of the case of the Crown, viz., that Manuel Purdy had become a citizen of the United States of America. The document being admitted, it is not so much a question of the admissibility of a piece of evidence as of the manner in which evidence admitted and admissible can properly be applied. In the view above expressed, the law does not permit the court to make use of certain marks on that document, that is to say, the words "Manuel Purdy," for the purpose of ascertaining whether or not the Manuel Purdy to whom the certificate was issued was the same person as the Manuel Purdy who signed the declaration of ownership. That is a proposition of law to which the court cannot refuse to give effect on this appeal; because the Crown by this appeal is asking the court to declare that the monies in court have been forfeited to the Crown and the court must consider whether there is a proper foundation for such a declaration in the evidence before it.

The appeal must, therefore, be dismissed with costs; but it must not be assumed, by reason of the fact that we have dismissed the appeal on a ground which is not the same as that upon which the judgment of the Judge in

1936
 THE KING.
 v.
 THE SHIP.
 "EMMA K"
 ET AL.
 Duff C.J.

(1) (1902) 86 L.T. 726, at 732.

1936
THE KING
v.
THE SHIP
"EMMA K"
ET AL.

Admiralty proceeded, that any disagreement is implied with the reasons upon which the learned judge held that the claim of Barrett to the monies in court has been established.

Appeal dismissed with costs.

Duff C.J.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondents: *Lucas & Lucas.*
